Supreme Court, U.S.
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No. 93-

IN THE

Supreme Court of the United States

October Term, 1993

ROBERT J. HENDERSON, Superintendent,

Petitioner,

- against -

MAURICE MAYO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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June 9, 1994

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QUESTIONS PRESENTED

1. In a habeas corpus proceeding, may a claim of ineffective assistance of appellate counsel be premised on counsel's failure to present a state-law claim that was recognized only after the defendant's state appeal?

2. Does the Second Circuit's approach to ineffective assistance of counsel conflict with this Court's approach to "new rule" jurisprudence?

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

ROBERT J. HENDERSON, Superintendent,

Petitioner,

- against -

MAURICE MAYO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

To the Honorable Chief Justice and the Associate Justices of the Supreme Court:

PRELIMINARY STATEMENT

Robert J. Henderson, Superintendent, seeks a writ of certiorari to review a January 3, 1994, order of the United States Court of Appeals for the Second Circuit affirming the grant of a writ of

habeas corpus under 28 U.S.C. section 2254.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, dated January 3, 1994, concluding that respondent Maurice Mayo received ineffective assistance of appellate counsel is set forth in the accompanying appendix at pages Pet. App. 3 to 45, and is reported at 13 F.3d 528. The judgment and opinion of the District Court, dated June 23 and June 14, 1993, respectively, also concluding that respondent Mayo received ineffective assistance of appellate counsel, is set forth in the accompanying appendix at pages Pet. App. 46 to 48, and 49 to 67, respectively. The

opinion of the District Court is also reported at 1993 U.S. Dist. LEXIS 8100.

JURISDICTION

The Order of the Court of Appeals was entered on January 3, 1994. An application for a rehearing and suggestion for rehearing in banc was denied on March 11, 1994 (Pet. App. 1-2). This Court's jurisdiction is being invoked under 28 U.S.C. section 1257 (a), and Rules 13.1 and 13.4 of the Rules of the Court.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment VI of the United States Constitution, provides, in pertinent part:

> In all criminal prosecutions, the accused shall ... have the Assistance of Counsel for his defence.

Amendment XIV, Section 1, of the United States Constitution, provides, in pertinent part:

> ... nor shall any state deprive any person of life, liberty, or property, without due process of law ....

STATEMENT OF THE CASE

A. The State Trial and Appeal

In 1980, respondent Mayo and John Buster were charged with one count of Robbery in the First Degree and two counts of Robbery in the Second Degree for the robbery of Aquilino Benitez.

The trial began on March 13, 1981. The testimony of Benitez, a Columbia University student, established that on September 20, 1980, Mayo and Buster robbed him at gunpoint and knifepoint in the elevator of his apartment building.

Benitez described his assailants, identified them in court, and testified to his identification of them in a lineup held eight days after the robbery. Benitez further identified a distinctive ring stolen from him, and recognized a black-handled knife and a silver starter's pistol as the robbery weapons. The government established that the ring and pistol were recovered from Mayo when Mayo was arrested, and that the knife was on Buster when Buster was arrested eight days after the robbery.

Mayo called no witnesses. Buster, his co-defendant, called two police witnesses and attempted to impeach Benitez' identification testimony through certain entries in the officers' routine police reports.

Mayo and Buster were convicted and pursued separate appeals. Mayo's attorney perfected Mayo's appeal first, filing a lengthy brief that presented eight claims in support of reversal of Mayo's conviction. On April 12, 1984, the Appellate Division unanimously affirmed Mayo's conviction. 100 A.D.2d 983, 474 N.Y.S.2d 157. On May 30, 1984, then-Associate Judge Judith S. Kaye denied Mayo leave to appeal. 62 N.Y.2d 808, 477 N.Y.S.2d 1033, 465 N.E.2d 1276.

With the benefit of the unsuccessful issues presented by Mayo, Buster then perfected his appeal. Amongst his claims was one that arose from an effort by the prosecutor, during the cross-examination of the police officers called by Buster, to show that their memo book entries

reflected a description of the robbers more consistent with that given by Benitez at trial than the description later recorded in other police reports. Objection had been made to the cross-examination on the ground that New York law had required disclosure of the memo book entries to the defense before the officers took the stand. The trial judge agreed, struck the cross-examination testimony relating to the memo book entries, and vigorously charged the jury that the memo books provided nothing inconsistent with the testimony of the defense witnesses.

Buster's appellate argument was that as a matter of state law "harmless error" analysis was impermissible with respect to the discovery claim, and accordingly that

he was entitled to a new trial despite the trial court's corrective actions. On April 23, 1985, the Appellate Division unanimously rejected Buster's argument and affirmed Buster's conviction. 110 A.D.2d 1093, 488 N.Y.S.2d 942.

Buster was permitted a further appeal to the New York Court of Appeals. On December 19, 1986, that court sided with Buster. After discussing prior extensions of New York's discovery rules, the court made a sweeping holding that harmless error analysis would not be applied when the prosecution fails to meet its disclosure obligations. 69 N.Y.2d 61, 511 N.Y.S.2d 580, 503 N.E.2d 1011.

Mayo's counsel, discovering the outcome of Buster's appeal, moved for reconsideration of his prior application

for discretionary review by the New York Court of Appeals. However, on March 30, 1987, Judge Kaye again denied Mayo leave to appeal. 69 N.Y.2d 883, 515 N.Y.S.2d 1031, 507 N.E.2d 1101. Three months later, Mayo filed a petition for a writ of error coram nobis in the Appellate Division, claiming that his attorney's failure to raise the discovery claim in the initial appeal had constituted ineffective assistance of counsel. The Appellate Division denied the petition, 134 A.D.2d 205, 520 N.Y.S.2d 721, and the New York Court of Appeals later dismissed Mayo's application for permission to appeal. 70 N.Y.2d 957, 525 N.Y.S.2d 841, 520 N.E.2d 559.

B. The Federal Habeas Corpus Proceedings

Mayo thereafter filed a pro se petition for a writ of habeas corpus in the United States District Court for the Southern District of New York. Not in the original petition, but later added to it, was the claim that he had received ineffective assistance of appellate counsel.

An evidentiary hearing on "the reasons counsel failed to raise the Rosario[1] claim and the practice of the New York defense bar regarding such claims" (see Pet. App. 162-163) was held on May 28, 1992. It was stipulated that Mayo's

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[1]The New York disclosure rule, later codified, had originated in the case of People v. Rosario, 9 N.Y.2d 286, 213 N.Y.S.2d 448, 173 N.E.2d 881, cert. denied, 368 U.S. 866 (1961).

appellate attorney did not remember why he had not raised the discovery claim. Two expert witnesses testified. Stanley Neustadter, a law professor and private attorney, opined that there had been no reason not to litigate the claim, but admitted that there was a "cloud of inconsistent decisions" on whether a "no harmless error" rule was the law in New York when Mayo's appeal was being perfected. Mark Dwyer, Chief of the Appeals Bureau of the New York County District Attorney's Office, testified that at the time Mayo's appeal was perfected there was no clearly established "no harmless error" rule for the failure to disclose witness statements.

Thereafter, Magistrate Judge Leonard Bernikow recommended that Mayo's petition

be granted, concluding that his appellate attorney should have foreseen the expansion of New York's discovery rule to require reversal without consideration of harmless error principles (Pet. App. 68-101). Notwithstanding the state's objections,[1] District JudgeLawrence M. McKenna concluded that federal habeas corpus relief should be granted (Pet. App.

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[1]The state pointed out that (1) when Buster's counsel raised the Rosario claim, the intermediate New York appellate court unanimously rejected it; (2) Mayo had been rebuffed by the New York Court of Appeals when he sought the benefit of the rule established in Buster's appeal; (3) the intermediate New York appellate court unanimously rejected Mayo's claim that appellate counsel had been ineffective for not anticipating this development of New York law; and (4) Mayo had failed to prove that which he had been accorded a hearing to prove, i.e., that at the time of Mayo's appeal the defense bar routinely was raising claims like the one Mayo's counsel had been disparaged for not raising.

49-67). Judge McKenna also rejected the state's argument that the magistrate had ignored the Court's opinion in Lockhart v. Fretwell, ___ U.S. ___, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993), that, for purposes of ineffective assistance claims, prejudice involves a determination of whether the result of the underlying proceeding was "unfair or unreliable," not whether "the outcome would have been different" (Pet. App. 64-65).

The Second Circuit Court of Appeals affirmed the grant of federal habeas corpus relief, holding that the New York Court of Appeal's "eventual ruling [in Buster's appeal] was easily predictable" (Pet. App. 28). The Second Circuit directed Mayo's release from custody unless within 90 days he was afforded a

retrial or was permitted to present his Rosario claim to the "appropriate New York State court ... as if it were properly and timely presented" (Pet. App. 45).[1]

REASONS FOR GRANTING THE WRIT

The ruling presents a critical issue of federal habeas corpus jurisprudence: are federal courts free to interfere with state criminal judgments by imposing their own views of what state rules mean? This Court has repeatedly pronounced that

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[1]No stay has been granted. To avoid Mayo's release from parole the People of the State of New York asked the Appellate Division, First Department to recalendar his appeal. That request was granted and the appeal is scheduled for oral argument on June 10, 1994. It is respondent's position that this appeal will not be mooted by these proceedings unless and until Mayo's appellate claims are finally rejected by the state courts.

federal habeas corpus courts are not to grant relief based upon interpretations of state law. E.g., Estelle v. McGuire, 502 U.S. ___, 112 S.Ct. 475, 480, 481, 116 L.Ed.2d 385 (1991). But here, under the rubric of ineffective assistance of counsel, the lower courts have done just that. They have granted relief to a petitioner based on their view that in 1994 (without relying on hindsight) they know more about what New York law was a decade ago than did either Mayo's appellate attorney, or the panel of the New York Appellate Division that heard and rejected Buster's appeal in 1985.

A. Whether Federal Courts Exercising Habeas Corpus Jurisdiction May Interfere With A State Conviction By Finding A Criminal Defendant's Attorney At Fault For Failing To Anticipate The Development Of State Law Represents An Important Question.

That federal courts may not grant habeas corpus relief for errors of state law committed by state courts would have seemed clear beyond dispute. The Court has made that clear emphatically, consistently, and recently. Estelle v. McGuire, ___ U.S. ___, 112 S.Ct. 475, 116 L.Ed.2d 385. That rule necessarily derives both from the fact that federal habeas corpus review is limited to errors arising out of federally-granted rights and the fact that the state courts are better able to determine the status of state law than federal courts. Equally

plain is that the federal right to effective assistance of counsel does not provide a back-door method for obtaining redress for arguable failures of state courts to recognize state-law errors.

But that is how the right to effective counsel was employed here. Mayo's essential complaint is that under state law he was entitled to a retrial even if a discovery error was harmless, and thus that the state trial court should not have granted him lesser relief than a mistrial. Of course, a habeas corpus court could not grant relief on such a state-law claim. Mayo therefore has argued in federal court that his appellate attorney should have predicted the "no harmless error" rule and argued the point to the Appellate Division. But on the appeal of co-

defendant Buster, not even the Appellate Division was able to predict that the New York Court of Appeals would later announce a "no harmless error" rule for this type of discovery violation.

It could not have been impermissibly ineffective for Mayo's attorney to hold the same opinion of state law as the trial court and the Appellate Division. The finding of the lower federal courts that subsequent developments in New York law were so readily "predictable" that the attorney was constitutionally ineffective represents nothing less than a finding that the federal courts can correct the state trial court and the state Appellate Division for errors of state law.

Nor is this case an isolated incidence of federal intrusion on matters that

should be left to New York's courts. In 1992 as well, the Second Circuit held that an attorney had been ineffective in not raising what the Second Circuit speculated was a valid claim under New York law. Claudio v. Scully, 982 F.2d 798 (2d Cir. 1992), cert. denied, ___ U.S. ___, 113 S.Ct. 2347, 124 L.Ed.2d 256 (1993). And, the Second Circuit, just recently, again analyzed an ineffective assistance claim based upon its perceptions of what the status of state law was at a particular point in time. Jameson v. Coughlin, ___ F.3d ___, Slip Op., Appeal No. 1166, 1994 U.S. App. LEXIS 11828 (2d Cir. April 13, 1994).

Indeed, the Second Circuit persists in these efforts to second-guess state determinations of issues of state law

notwithstanding the fact that it concedes that it has "not always been successful in predicting" how state law would develop. Id., Slip Op. at 3223 fn, 119 U.S. App. LEXIS 11828 *9. Indeed, after the Second Circuit's Claudio decision, the New York Court of Appeals rejected the Second Circuit's view of state law. People v. Claudio, 83 N.Y.2d 76, 607 N.Y.S.2d 912, 629 N.E.2d 384 (1993).

Thus, the Second Circuit, under the rubric of determining ineffective assistance of counsel claims, has made a practice of second-guessing state appellate interpretations of state law and engaging in "predictions" of state law. That practice strikes at the heart of the relationship between state rights and federal authority and directly impacts on

the states comprising the Second Circuit's jurisdiction. It results in the disruption of orderly state processes, and adds to the burdens of criminal law enforcement by freeing the guilty in collateral proceedings under a thinly veiled "hindsight" analysis.

B. The Second Circuit's Rule Circumvents Settled Precedent And Conflicts With The Court's Habeas Corpus "New Rule" Principles.

The rule followed by the Second Circuit circumvents fundamental principles that limit the grant of collateral relief to the status of the law at the time of the events, and not upon how the law later develops.

The standards applicable to ineffective assistance of counsel claims are easily stated. There are, of course,

two prongs that must be met by the criminal defendant raising such a claim. First, the attorney must have provided representation that was "outside the wide range of professionally competent assistance." Strickland v. Washington, 466 U.S. 668, 690, 691-692 (1984). Second, the criminal defendant must have suffered prejudice in the sense that the result of the proceeding was fundamentally "unfair" or "unreliable." Lockhart v. Fretwell, ___ U.S. ___, 113 S.Ct. 838, 842, 122 L.Ed.2d 180, 189 (1993).[1]

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[1]The state hotly litigated prejudice below. Given the overwhelming identification evidence and physical evidence of guilt, including Mayo's possession of some of the stolen property when arrested, the judgment of conviction was neither "unfair" nor "unreliable." Moreover, had Mayo raised the discovery claim in the only appeal he had as of right, there is no reason to believe that

(continued...)

To meet the first prong, the attorney must be guilty of "gross incompetence." Kimmelman v. Morrison, 477 U.S. 365, 382 (1986). Competence must be presumed, and one cannot base relief upon hindsight. Lockhart v. Fretwell, ___ U.S. at ___, 113 S.Ct. at 844, 122 L.Ed.2d at 190. Rather, the attorney's conduct must be "viewed as of the time of counsel's conduct." Strickland v. Washington, 466 U.S. at 690. In considering the conduct of an appellate attorney, it is not enough that he or she

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[1](...continued)
the intermediate appellate court would not have rejected it -- just as was done when Buster raised it. Thus, had Mayo's attorney raised the claim in the intermediate appellate court, there is no "reasonable probability" that the outcome of that proceeding in 1984 would have been different. Strickland v. Washington, 466 U.S. at 694.

did not raise every nonfrivolous claim. Jones v. Barnes, 463 U.S. 745 (1983).

As to the first prong, there can be no question that the Second Circuit engaged in hindsight that was motivated by the co-defendant's ultimate success in the New York Court of Appeals well after Mayo's direct appeal was concluded. Only hindsight explains a finding of ineffectiveness for failure to raise a claim that was unanimously rejected, when later raised by the co-defendant, by the only court to which that Mayo had an appeal as of right.

To avoid the proscription against "hindsight," the Second Circuit concluded that the development of a "no harmless error" rule should have been "easily predictable" by Mayo's attorney. But an

effective assistance standard predicated on "predicting" creates a result that is grounded in neither fact nor law, but in speculation. Such a standard is nothing but a subterfuge for the application of hindsight. Whether federal courts may require that state judgments be set aside if appellate attorneys lack clairvoyance as to future state law developments is a fundamentally important question.

Indeed, the approach of the Second Circuit is dramatically at odds with this Court's "new rule" jurisprudence. A substantive constitutional violation entitles a defendant to relief on federal collateral review only if the constitutional right was firmly established at the time the conviction became final. However, under the Second

Circuit's approach, the elusive right to effective assistance of counsel permits collateral federal relief where the attorney did not foresee the establishment of future rights under state law or federal law.

More particularly, regardless of whether imaginative claims have been pressed by imaginative counsel, convictions are not set aside on collateral federal review unless the federal constitutional principle in issue was "dictated" or "compelled" by precedent. E.g., Graham v. Collins, 506 U.S.___, 113 S.Ct. 892, 897-898, 122 L.Ed.2d 260, 270 (1993). Moreover, the Court has concluded that this means that "reasonable, good-faith interpretations of

existing precedents made by state courts" should be validated. Id.

The Second Circuit has neatly circumvented that limitation in habeas corpus review. It has created a rule that requires not courts, but attorneys, to "predict" developments in the law or be branded ineffective. And that label can set the criminal free. Thus, in New York a federal court may grant habeas corpus relief when an appellate attorney has decided what claims to present by looking to established precedent rather than trying to "predict" the future.

This Court has said that a finding of ineffectiveness cannot be premised on later changes in the law. The Court has said that ineffectiveness must be gauged by the circumstances "as of the time of

counsel's conduct." Strickland v. Washington, 477 U.S. at 690. That is fundamentally inconsistent with ephemeral notions based upon predictions, regardless of how "easily" those predictions are made after the fact, and if later developments in state rules might have been of benefit to a criminal defendant.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court should either summarily vacate the judgment of the Second Circuit Court of Appeals and remand for further consideration or direct full briefing and argument on the issues presented in this petition.

Respectfully submitted,

Attorney for Petitioner

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Respondent.

APPENDIX IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 11th day of March, one thousand nine hundred and ninety-four

MAURICE MAYO, Petitioner-Appellee, -against- ROBERT J. HENDERSON, Superintendent, Respondent-Appellant, ROBERT ABRAMS, Attorney General of the State of New York, Respondent.	Docket No. 93-2446

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT,
GEORGE LANGE III, Clerk

_____
Carolyn Clark Campbell
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

- - - - - -

No. 566 August Term, 1993

(Argued: November 1, 1993
Decided: January 3, 1994

Docket No. 93-2446

MAURICE MAYO,

Petitioner-Appellee,

- v. -

ROBERT J. HENDERSON, Superintendent,

Respondent-Appellant,

ROBERT ABRAMS, Attorney General of the State of New York,

Respondent.

Before: OAKES, KEARSE, and ALTIMARI, Circuit Judges:

Appeal from a judgment of the United States District Court for the Southern

District of New York, Lawrence M. McKenna, Judge, granting petition for habeas corpus on the ground that petitioner was denied his constitutional right to effective assistance of appellate counsel.

Affirmed.

DAVID A. LEWIS, New York, New York (The Legal Aid Society, Federal Defender Services Unit, New York, New York, on the brief), for Petitioner-Appellee.

DAVID J. MUDD, Assistant District Attorney, New York, New York (Robert M. Morgenthau, District Attorney, New York County, Marc Frazier Scholl, Assistant District Attorney, New York, New York, on the brief), for Respondent-Appellant.

KEARSE, Circuit Judge:

Respondent Robert J. Henderson, Superintendent of New York State's Auburn Correctional Facility (the "State") appeals from a final judgment of the

United States District Court for the Southern District of New York, Lawrence M. McKenna, Judge, granting the petition of Maurice Mayo, a New York State prisoner, for a writ of habeas corpus on the ground that he was denied his constitutional right to effective assistance of counsel when his state appellate attorney failed to raise an issue that the New York Court of Appeals, when the issue was raised on appeal by Mayo's codefendant, called a per se ground for reversal. For the reasons stated below, we affirm.

I. BACKGROUND

In 1981, Mayo and his codefendant John Buster were convicted in New York state court on one count of robbery in the first degree and two counts of robbery in the second degree. The events leading to

conviction were described at the state trial as follows.

In the early morning hours of September 20, 1980, Columbia University student Aquilino Benitez returned to his apartment building and in the lobby encountered two men, whom he later identified as Mayo and Buster, waiting for the elevator. All three entered the elevator. When they reached the sixth floor, Mayo turned to Benitez, pulled out what appeared to be a .22-caliber revolver, and told Benitez to hand over his money and jewelry. Buster pulled out a black folding knife with a panther on its handle and demanded Benitez's wallet. Benitez handed Mayo and Buster about $100 in cash as well as his jewelry, which included a silver ring inscribed with his nickname, "Tuto."

Eight days later, Mayo and Buster were arrested in connection with an investigation of a series of robberies. When arrested, Mayo was carrying a .22-caliber starter's pistol and was wearing a silver ring with "Tuto" engraved on it. When Buster was arrested, he had in his possession a black pocket knife with a panther on the handle. Each man also had receipts for sales of jewelry.

A. The State Court Proceedings

At trial, Benitez identified Mayo and Buster and testified that he had also identified them in separate pre-trial line-ups. The gun and ring seized from Mayo and the knife seized from Buster were introduced into evidence, and Benitez identified those objects as well.

The defense theory was that Benitez had misidentified the defendants. Buster's attorney called two police officers and elicited that the reports they had filed following their interviews of Benitez immediately after the incident ("incident reports") contained descriptions of the robbers that differed in important ways from the physical appearances of the defendants. The prosecutor, however, in her cross-examination of the two officers, introduced memo books, which had not previously been furnished to the defense, containing the officers' original notes of Benitez's statements. The notes revealed that the discrepancies identified by defense counsel were simply errors that had occurred in the officers' transcription of their notes of Benitez's

statements from the memo books to the incident reports. Benitez's in-court identifications were therefore consistent with the officers' notes as to his initial descriptions of the robbers.

Both defendants immediately moved for a mistrial on the ground that the prosecutor's failure to turn these memo books over to them prior to trial was a violation of the rule of disclosure formulated in People v. Rosario, 9 N.Y.2d 286, 213 N.Y.S.2d 448, cert. denied, 368 U.S. 866 (1961), and later codified in the New York Criminal Procedure Law. Under that rule, the prosecutor has an obligation, prior to trial, to "make available to the defendant . . . [a]ny written or recorded statement . . . made by a person whom the prosecutor intends to call as a witness at trial, and which

relates to the subject matter of the witness's testimony." N.Y. Crim. Pro. L. § 240.45(1)(a). Buster's counsel also reminded the court that he had expressly asked the prosecutor, in the court's presence, to produce any documents such as the memo books and had stated that the defense did not want to be "sandbagged." The prosecutor admitted that she knew of the existence of the documents but had not given them to counsel.

The trial court called the prosecutor's failure to turn over the memo books "inexcusable" and "shocking" but denied the mistrial motions. The court gave a limiting instruction, telling the jury to disregard the officers' testimony concerning the memo books.

The jury convicted Mayo and Buster of the charges against them. Mayo was sentenced to serve 10-20 years in prison.

Mayo and Buster filed separate appeals, and Mayo's appeal was perfected first. In his brief to the Appellate Division, First Department, Mayo's appellate counsel detailed the course of the trial, including the events surrounding the Rosario violation and the trial court's denial of the mistrial motions, and he raised a number of issues, asserting several evidentiary and other trial errors. However, he did not mention the Rosario violation as a ground for reversal. Mayo's conviction was affirmed by the First Department without opinion, see People v. Mayo, 100 A.D.2d 983, 474 N.Y.S.2d 157 (1st Dep't 1984), and leave to appeal to the New York Court of Appeals

was denied, see People v. Mayo, 62 N.Y.2d 808, 477 N.Y.S.2d 1033 (1984).

Following the affirmance of Mayo's conviction, Buster perfected his appeal and raised the Rosario issue as a ground for reversal. The Appellate division affirmed Buster's conviction without opinion. See People v. Buster, 110 A.D.2d 1093, 488 N.Y.S.2d 942 (1st Dep't 1985). The Court of Appeals, however, granted leave to appeal, and it reversed Buster's conviction sub nom. People v. Ranghelle, 69 N.Y.2d 56, 511 N.Y.S.2d 580 (1986). The Court of Appeals held that a Rosario violation like this one, in which the prosecutor had failed to deliver Rosario material prior to trial, constitutes "per se error requiring that the conviction be reversed and a new trial ordered." People

v. Ranghelle, 69 N.Y.2d at 63, 511 N.Y.S.2d at 585.

When Buster's conviction was vacated, Mayo promptly sought reconsideration of his own application for discretionary review in the Court of Appeals, his motion was denied. See People v. Mayo, 69 N.Y.2d 883, 515 N.Y.S.2d 1031 (1987). He then filed a petition for a writ of error coram nobis in the Appellate Division, claiming that he had been denied the effective assistance of counsel. That petition, too, was denied, see People v. Mayo, 134 A.D.2d 205, 520 N.Y.S.2d 721 (1st Dep't 1987), and leave to appeal that denial to the Court of Appeals was refused on the ground that the Appellate Division's coram nobis decision was not appealable, see People v. Mayo, 70 N.Y.2d 957, 525 N.Y.S.2d 841 (1988).

B. The Present Habeas Proceeding

In June 1988, proceeding pro se, Mayo filed the present petition in the district court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (1988). As amended, the petition raised all of the grounds asserted in Mayo's original state appeal and added the claim of ineffective assistance of appellate counsel. The State opposed the petition. Pointing out that the Appellate Division had rejected the Rosario argument when it was made by Buster, the State argued that the failure of Mayo's attorney to raise that argument could not be viewed as unreasonable.

The petition was referred to Magistrate Judge Leonard Bernikow, who, in a Report and Recommendation dated October 16, 1990 ("1990 Report"), recommended that all of the claims except ineffectiveness

of appellate counsel be dismissed, that an attorney be appointed to represent Mayo in the present proceeding, and that an evidentiary hearing be held as to the reasons for Mayo's state appellate counsel's not raising the Rosario issue and as to the practice of the New York defense bar with respect to such claims. The district court accepted the magistrate judge's recommendation.

At the hearing before the magistrate judge, the parties stipulated that Mayo's appellate attorney did not remember why he had not raised the Rosario issue; indeed, he did not even remember preparing Mayo's brief. Mayo introduced the expert testimony of Stanley Neustadter, professor of appellate advocacy at Cardozo Law School and Brooklyn Law School, and a former deputy chief and director of

training at the Legal Aid Society's Criminal Appeals Bureau. Neustadter gave his opinion that, despite any uncertainty as to whether a Rosario violation constituted a per se ground for reversal or instead was subject to harmless error analysis, Mayo's state appellate counsel should have raised the Rosario claim on the appeal. Neustadter testified that the trial court's error was unmistakable and had been properly preserved. Moreover, because the memo books had "obliterated" the defense and "embarrassed" defense counsel, the Rosario error had clearly been prejudicial to the defendant's case. Neustadter testified that appellate counsel's failure to raise the Rosario claim was especially egregious in light of the weak nature of the claims he did raise. He concluded that there was "no

reasonable ground" for not raising the Rosario issue.

In opposition, the State introduced the testimony of Assistant District Attorney Mark Dwyer, Chief of the Appeals Bureau of the New York County District Attorney's Office. Dwyer gave his opinion that it was unclear prior to 1985 whether or not harmless error analysis applied to Rosario violations. Dwyer testified that a reasonable attorney might well have concluded that, because the "undisclosed document was totally insignificant" (Hearing Transcript, May 28, 1992 ("Tr."), 60) and because of the uncertainty concerning the proper standard for review of Rosario errors, there was little to be gained by raising the issue on appeal.

In a Report and Recommendation dated March 31, 1993 (the "1993 Report"),

Magistrate Judge Bernikow concluded that the performance of Mayo's appellate counsel had been constitutionally deficient, and he recommended that the petition be granted. The magistrate judge concluded that Mayo met the test for ineffectiveness articulated in Strickland v. Washington, 466 U.S. 668, 688 (1984), finding that appellate counsel's performance had been below and objective standard or reasonableness, 1993 Report at 14, and that, in view of the reversal of Mayo's codefendant's conviction by the Court of Appeals, "a reasonable probability exists that petitioner's Rosario claim would have succeeded but for counsel's alleged error," 1993 Report at 8. The magistrate judge termed the question of the competence of counsel's performance "a close one," 1993 Report at

9, noting that although the Appellate Division had applied harmless error analysis to Rosario violations in cases after Mayo's appeal had been filed, "the Court of Appeals had indicated that Rosario violations constituted per se error," 1993 Report at 11. He noted that appellate counsel had been demonstrably aware of the Rosario violation but had chosen instead to "concentrate[] on questions of dubious legal validity." 1993 Report at 15. The magistrate judge concluded that counsel should not have ignored the Rosario violation as a ground for reversal and that his "questionable choice of issues supports the conclusion that his assistance cannot withstand constitutional scrutiny." 1993 Report at 16.

In a Memorandum and Order dated June 14, 1993, Judge McKenna, overruling the State's objections, agreed with the 1993 Report except for a portion of the recommended remedy. Accordingly, the court ordered that the writ be granted unless the State afforded Mayo an opportunity to present his appeal to the appropriate New York State court within 90 days for consideration of the Rosario issue as if it were properly and timely presented, or in alternative, within 90 days gave Mayo a new trial. This appeal followed.

II. DISCUSSION

On appeal, the State contends that the judgment should be reversed on the grounds (1) that the performance of Mayo's appellate counsel was not deficient in

light of (a) the lack of clarity in the law at the time of Mayo's appeal, and (b) the lack of a uniform practice by defense attorneys to raise Rosario issues in similar cases; and (2) that the failure to raise the issue did not prejudice Mayo. We reject these contentions.

In order to prevail on a claim of ineffective assistance of counsel within the framework established by the Supreme Court in Strickland v. Washington, 466 U.S. 668 ("Strickland"), a habeas petitioner must satisfy a two-part test. First, he must show that his attorney's performance "fell below an objective standard of reasonableness," id. at 688, and second, he must show that there is a "reasonable probability" that but for counsel's error, the outcome would have been different, id. at 694. Although the

Strickland test was formulated in the context of evaluating a claim of ineffective assistance of trial counsel, the same test is used with respect to appellate counsel. See, e.g., Claudio v. Scully, 982 F.2d 798, 803 (2d Cir. 1992) ("Claudio"), cert. denied, 113 S.Ct. 2347 (1993); Abdurrahman v. Henderson, 897 F.2d 71, 74 (2d Cir. 1990).

In attempting to demonstrate that appellate counsel's failure to raise a state claim constitutes deficient performance, it is not sufficient for the habeas petitioner to show merely that counsel omitted a nonfrivolous argument, for counsel does not have a duty to advance every nonfrivolous argument that could be made. See Jones v. Barnes, 463 U.S. 745, 754 (1983). However, a petitioner may establish constitutionally

inadequate performance if he shows that counsel omitted significant and obvious issues while pursuing issues that were clearly and significantly weaker. As the Seventh Circuit has held:

> When a claim of ineffective assistance of counsel is based on failure to raise viable issues, the district court must examine the trial court record to determine whether appellate counsel failed to present significant and obvious issues on appeal. Significant issues which could have been raised should then be compared to those which were raised. Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.

Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1985). See, also, Fagan v. Washington, 942 F.2d 1155, 1157 (7th Cir. 1991) ("His lawyer failed to raise either claim, instead raising weaker claims. . . . No tactical reason -- no reason other than

oversight or incompetence -- has been or can be assigned for the lawyer's failure to raise the only substantial claims that [defendant] had."); Matire v. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987) (ineffective assistance of counsel when appellate counsel ignored "a substantial, meritorious Fifth Amendment issue" raising instead a "weak issue"). The claim whose omission forms the basis of an ineffective assistance claim may be either a federal-law or a state-law claim, so long as the "failure to raise the state . . . claim fell 'outside the wide range of professionally competent assistance.'" Claudio, 982 F.2d at 805 (quoting Strickland, 466 U.S. at 690).

In assessing the attorney's performance, a reviewing court must judge his conduct on the basis of the facts of

the particular case, "viewed as of the time of counsel's conduct," Strickland, 466 U.S. at 690, and may not use hindsight to second-guess his strategy choices, see Lockhart v. Fretwell, 113 S. Ct. 838, 844 (1993) ("Fretwell"). Counsel is not required to forecast changes in the governing law. See, e.g., Horne v. Trickey, 895 F.2d 497, 500 (8th Cir. 1990) (ineffectiveness not established by claim that "counsel should have realized that the Supreme Court was planning a significant change in the existing law, and that the failure to anticipate this change rises to the level of constitutional ineffectiveness"). However, the attorney's omission of a meritorious claim cannot be excused simply because an intermediate appellate court would have rejected it. In Claudio, we

ruled that "[n]o reasonably competent attorney should have missed" the omitted claim, "even though the Appellate Division ultimately rejected it." 982 F.2d at 805; see also, Orazio v. Dugger, 876 F.2d 1508, 1513-14 (11th Cir. 1989) (counsel's failure to raise claim on appeal constituted ineffective assistance despite the fact that three Florida appellate court decisions had rejected the precise claim at issue).

In evaluating the prejudice component of the Strickland test, a court must determine whether, absent counsel's deficient performance, there is a reasonable probability that the outcome of the proceeding would have been different. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694.

The outcome determination, unlike the performance determination, may be made with the benefit of hindsight. See Fretwell, 113 S. Ct. at 844.

To establish prejudice in the appellate context, a petitioner must demonstrate that "there was a 'reasonable probability' that [his] claim would have been successful before the [state's highest court]." Claudio, 982 F.2d at 803 (footnote omitted). We have ruled that the fact that the omitted claim involved a right that had not yet explicitly been recognized by the state's highest court does not preclude such a finding. See Claudio, 982 F.2d at 803-05 (finding prejudice in counsel's failure to raise a state-law claim for ineffective assistance of counsel despite the fact that the New York Court of Appeals had not held that

there was any state constitutional right to effective assistance of counsel). Where the highest court's eventual ruling was easily predictable, we have held that even an adverse ruling by the intermediate appellate court on the very claim at issue did not preclude a finding that there was a reasonable probability that the claim would have succeeded in the state's highest court. See Claudio, 982 F.2d at 803.

With these principles in mind, we turn to the present appeal.

A. Counsel's Performance in Not Arguing the Rosario Violation

We agree with the district court that Mayo's state appellate counsel's failure to argue the Rosario issue was below the standards of reasonably competent performance, for the claims he raised were

extremely weak, while the Rosario claim was particularly strong. Despite the State's contention that it was not clear prior to 1985 that a Rosario violation was to be considered a per se ground for reversal, the pronouncements from the Court of Appeals prior to October 1983, when Mayo's appellate counsel filed his brief, indicated that that court would apply a per se reversal rule to Rosario violations.

Under the Rosario rule, the prosecutor is required to make available to the defendant prior to trial "[a]ny written or recorded statement . . . made by a person whom the prosecutor intends to call as a witness at trial, and which relates to the subject matter of the witness's testimony." N.Y. Crim. Pro. L. § 240.45(1)(a). It is not error to fail

to turn over documents that are nothing more than duplicative equivalents of statements previously turned over to the defense, see People v. Consolazio, 40 N.Y.2d 446, 454, 387 N.Y.S.2d 62, 66 (1976) ("Consolazio"), cert. denied, 433 U.S. 914 (1977); People v. Payne, 52 N.Y.2d 743, 745, 436 N.Y.S.2d 271, 271 (1980) (mem.), or that are irrelevant, People v. Kanefsky, 50 N.Y.2d 162, 167, 428 N.Y.S.2d 453, 455 (1980). But the prosecutor is not entitled to withhold material on the ground that it would have been of little or no use to the defense or that a witness's prior statements were entirely consistent with his testimony at trial. People v. Consolazio, 40 N.Y.2d at 454, 387 N.Y.S.2d at 66.

The Court of Appeals first addressed the matter of whether a Rosario violation

could be harmless error in 1976. In Consolazio, after noting that a failure to turn over Rosario material could not be excused on the basis that the material would not have aided the defense, the court stated, "We thus reject arguments that consideration of the significance of the content or substance of a witness' prior statements can result in a finding of harmless error." Consolazio, 40 N.Y.2d at 454, 387 N.Y.S.2d at 66. The court expressly "distinguished . . . pre-Rosario convictions as to which this court applied a harmless error analysis where violations of the Rosario rule were found." Id. n.*. See also In re Kelvin D., 40 N.Y.2d 895, 896, 389 N.Y.S.2d 350, 351 (1976) (mem.) (reversing for Rosario violation, stating that "[t]he fact that the defense counsel examined the documents during the course

of the investigating officer's testimony does not suffice to overcome the erroneous refusal to provide defense counsel with copies for use during the examination of the witnesses who gave the prior statements to the initial officers on the scene.").

Though the Consolazio statements were dicta in light of the holding that the material at issue there was not required to be turned over, those statements indicated that New York's highest court would not apply harmless-error analysis in review of Rosario violations. Plainly, that court so interpreted them, for in People v. Mattiace Industries, Inc., 52 N.Y.2d 739, 436 N.Y.S.2d 269 (1980) (mem.), the court cited Consolazio for the proposition that a Rosario violation could not be considered harmless. After

rejecting other arguments, the court stated:

> Reversal is mandated, however, because counsel for the defense was entitled to the prior statements made by the witnesses for the purpose of impeachment. The denial of this request was improper (People v. Rosario . . .). This error cannot be deemed harmless (People v. Consolazio . . .).

People v. Mattiace Industries, Inc., 52 N.Y.2d at 741, 436 N.Y.S.2d at 270. See also People v. Jackson, 78 N.Y.2d 638, 640-41, 578 N.Y.S.2d 483, 485 (1991) ("In People v. Consolazio . . . , we first held that harmless error analysis was inappropriate when a defendant challenged the prosecution's failure to turn over Rosario material."). Although in Jackson the Court of Appeals held that the per se error rule for Rosario violations was inapplicable to collateral review pursuant to CPL 440.10, the court has not deviated

from the principle that on direct review of such violations, the per se error rule applies and harmless-error analysis does not.

When Mayo's appeal was filed, Mattiace, citing Consolazio and stating that the Rosario "error cannot be deemed harmless," was the Court of Appeals' most recent published statement dealing with Rosario violations. It is difficult, in light of the statements in Consolazio and Mattiace, to see how counsel's failure to argue the Rosario violation, which was properly preserved at trial, explicitly acknowledged and criticized by the trial court, and unexplained by the prosecutor, could be considered competent performance.

The State argues that counsel's failure to raise the Rosario claim can nonetheless be justified because a per se

rule of reversal for such violations had not been adopted by the Appellate Division. We see several flaws in this argument. First, it was not entirely clear what standard the First Department applied to Rosario issues. Although that court appeared to eschew a per se rule in People v. Gonzalez, 74 A.D.2d 763, 764, 425 N.Y.S.2d 601, 603 (1st Dep't 1980) (mem.), ("[i]n the usual case, this might well have been considered not to be prejudicial, but we are not prepared to so conclude under the facts here presented"), it did not hold the error there harmless and it vacated the defendant's conviction. Nor have we found any published opinion of the First Department after Consolazio and before Mayo's counsel filed his appeal in October 1983, in which that court affirmed conviction obtained after a Rosario

violation. On the other hand, we are aware of several cases in which such convictions had been overturned. See, e.g., People v. Rodelfo, 80 A.D.2d 815, 815, 437 N.Y.S.2d 317, 318 (1st Dep't 1981) (mem.) (reopening suppression hearing to allow defendant to make use of Rosario material); People v. Gonzalez, 74 A.D.2d at 764, 425 N.Y.S.2d at 603 (reversing conviction); People v. Flores, 57 A.D.2d 783, 784, 394 N.Y.S.2d 670, 670 (1st Dept. 1977) (mem.) (reversing conviction); see also People v. Kanefsky, 64 A.D.2d 401, 403, 409 N.Y.S.2d 713, 714 (1st Dep't 1978) (reversing conviction), reversed, 50 N.Y.2d 162, 167, 428 N.Y.S.2d 453, 455 (1980) (reversing Appellate Division on ground that undisclosed material was irrelevant). Thus, even the

decisions of the First Department were at most ambiguous.

Further, even if it were reasonable to believe that harmless-error analysis would be applied, it is difficult to understand why counsel would not argue that the error in the present case was not harmless. The prosecutor's surprise production of the officers' interview notes in cross-examining those witnesses must have had a dramatic effect that surely affected the fairness of the proceeding. It was certainly arguable that the trial court's instructing the jury not to consider those notes would have been woefully ineffective.

Finally, and most importantly, whether or not the Appellate Division believed harmless-error analysis applied, plainly the Court of Appeals did not.

Competent counsel cannot reasonably consider an intermediate court's equivocation to be a basis for omitting an argument that had already been expressly suggested by the state's highest court.

The State also argues that Mayo's state appellate attorney's performance cannot properly be found inadequate because Mayo did not prove that prior to 1985, the defense bar routinely and uniformly argued that a prosecutor's inadvertent failure to disclose Rosario material constituted per se reversible error. We reject this argument. We would not require a habeas petitioner to provide a statistical analysis comparing the number of cases in which there were Rosario violations and the number of cases in which those violations were argued as a per se ground for reversal. We regard the

significant number of Appellate Division cases adjudicating Rosario claims around this time as an indication that the defense bar was generally aware that Rosario violations presented viable issues for appeal. Though the State's expert witness Dwyer testified that he did not "think the awareness of the Court of Appeals doctrine revealed in Ranghelle and Jones would have been general throughout the defense bar" (Tr. 64), he stated that Legal Aid attorneys were making such claims, and he conceded that he did not have knowledge as to whether or not such claims were routinely raised. He testified that he could not say that they were not routinely raised.

Finally, we note that instead of arguing that Rosario issue, which the Court of Appeals had indicated could not

be harmless, Mayo's state appellate counsel chose to argue issues that were particularly weak and had little or no chance of success. For example, he challenged credibility findings made by the court in denying a pretrial suppression motion. And notwithstanding, inter alia, Benitez's identification of Mayo and Mayo's possession of Benitez's ring, counsel argued that the evidence was insufficient to support a conviction. We agree with the district court that counsel's failure to raise the Rosario claim on appeal fell so far below the accepted level of competence as to deny Mayo his constitutional right to counsel.

B. Prejudice

The prejudice component of the Strickland test need not detain us long.

Given the fact that both Mayo and his codefendant properly objected to the Rosario violation at trial and the fact that by raising the issue on appeal the codefendant obtained a new trial, there was at the very least a reasonable probability that, had Mayo's attorney raised that issue on appeal, Mayo too would have been granted a new trial. The State's argument that the Appellate Division would have rejected the Rosario claim if Mayo had raised it, an argument supported by the fact that that court rejected the claim when raised by his codefendant, is unpersuasive since the eventual outcome was a vacatur of the conviction by the Court of Appeals. We assume that the Court of Appeals would have treated similarly-situated codefendants similarly. See Strickland,

466 U.S. at 695 ("An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, 'nullification,' and the like.").

C. The Contention that New York Law Has Changed

Finally, the State argues that Mayo is not entitled to habeas relief because New York no longer follows the rule that Rosario violations such as this one require a per se reversal. See Fretwell, 113 S. Ct. at 844 (petitioner cannot show prejudice from counsel's failure to make an objection that would have been supported by a decision that was subsequently overruled). We reject the suggestion that there has been any change in New York law with respect to violations of the nature that occurred here.

In arguing that the law has changed, the State relies on People v.Banch, 80 N.Y.2d 610, 593 N.Y.S.2d 491 (1992) ("Banch"). In Banch, the Court of Appeals noted that when "the Rosario violation is not a complete failure to disclose the material but rather a delay in its disclosure [,] . . . reversal is not required unless the delay substantially prejudiced the defendant." Banch, 80 N.Y.2d at 617, 593 N.Y.S.2d at 495. For two reasons, this ruling affords the State no relief. First, the Banch proposition was the rule as well when Ranghelle was decided. Thus, the Ranghelle court stated that "[w]hen the People delay in producing Rosario material, the reviewing court must ascertain whether the defense was substantially prejudiced by the delay." Ranghelle, 69 N.Y.2d at 63, 511 N.Y.S.2d

at 585. And the Banch court confirmed Ranghelle's holding that "where a defendant is deprived of Rosario material at trial, a new trial is required." Banch, 80 N.Y.2d at 615, 593 N.Y.S.2d at (citing Ranghelle).

Second, even if Banch had stated a new rule, it would be inapplicable to the present case. The trial use of Rosario material not theretofore produced cannot be termed a mere "delay." Indeed, in deciding Mayo's codefendant's case, the Court of Appeals stated that the state could not properly characterize its conduct as mere "delay." Ranghelle, 69 N.Y.2d at 65, 511 N.Y.S.2d at 586. We see no reason to doubt that the Court of Appeals continues to treat Ranghelle as good law and that, on direct review,

Rosario violations are not subject to harmless-error analysis.

CONCLUSION

For the foregoing reasons, we conclude that Mayo's appellate counsel was ineffective and that Mayo was prejudiced by this ineffectiveness, and we therefore affirm the decision of the district court granting the writ of habeas corpus unless the State affords Mayo an opportunity to present his appeal to the appropriate New York State court within 90 days for consideration of the Rosario issue as if it were properly and timely presented, or in the alternative, provides Mayo a new trial within 90 days.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MAURICE MAYO,	:	
	:	
Petitioner,	:	88 Civil 4239
	:	(LMM)
-against-	:	
	:	Judgment
ROBERT J. HENDERSON, Superintendent, et ano.,	:	
	:	
Respondents.	:	

Petition for a Writ of Habeas Corpus pursuant to T. 28 U.S.C. 2254, having been submitted to the Honorable LAWRENCE M. McKENNA, U.S.D.J., and the Court thereafter on June 14, 1993, having handed down its memorandum and order; adopting the Report in its entirety with the exception of a portion of the Report's recommended remedy, granting petitioner's petition for a writ of habeas corpus, unless the state affords petitioner an opportunity to present his Rosario claim

to the appropriate New York State court within ninety days of the date of the Court's Order, for consideration as if the Rosario issue had been properly presented, and with such appeals(s), if any, as would be provided by New York State law were the presentation of the Rosario claim timely, or in the alternative, the state provides petitioner a new trial within ninety days of the date of the Court's Order, it is,

ORDERED, ADJUDGED AND DECREED; That the Report and Recommendation of Magistrate Judge Leonard Bernikow, dated October 16, 1990, be and it is hereby adopted in its entirety with the exception of a portion of the Report's recommended remedy, and it is further,

ORDERED, that petitioner's application for a writ of habeas corpus be and it is hereby granted, unless that

state affords petitioner an opportunity to present his Rosario claim to the appropriate New York State court within ninety days of the date of the Court's Order, for consideration as if the Rosario issue had been properly presented, and with such appeal(s), if any, as would be provided by New York State law were the presentation of the Rosario claim timely, or in the alternative, the state provides petitioner a new trial within ninety days of the date of the Court's Order.

DATED: New York, New York
June 23, 1993

_____
Clerk

By: _____
Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MAURICE MAYO,	:	
	:	
Petitioner,	:	88 Civ. 4239
	:	(LMM)
-against-	:	
	:	MEMORANDUM
ROBERT J. HENDERSON,	:	AND ORDER
Superintendent, et ano.,	:	
	:	
Respondents.	:	

McKENNA, D.J.

Petitioner, convicted with co-defendant John Buster, following a trial by jury, in the Supreme Court of the State of New York, New York County, in March 1981 of robbery in the first degree and two counts of robbery in the second degree, sentenced as a predicate felon to an indeterminate prison term of from ten to twenty years, seeks a writ of habeas

corpus pursuant to 28 U.S.C. § 2254.[1] Petitioner's conviction was affirmed, without opinion, by the Appellate Division, First Department, on April 12, 1984. People v. Mayo, 474 N.Y.S.2d 157 (N.Y. App. Div. 1st Dep't 1984). On May 30, 1984, the New York Court of Appeals denied petitioner leave to appeal the affirmance of his conviction. People v. Mayo, 477 N.Y.S.2d 1033 (N.Y. 1984). After the New York Court of Appeals reversed the conviction of his co-

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[1] "The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a) (1988).

defendant,[2] petitioner sought

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[2]In its decision, the court outlined the facts underlying petitioner's conviction.

> All three charges stemmed from a single incident during which Aquilino Benitez, a student attending Columbia University, was robbed by two men in the elevator of his apartment building. At trial, Benitez was the chief witness for the prosecution. He testified that on the day in question two men entered the elevator with him at the ground floor, stopped it at the sixth floor, and then robbed him of jewelry and money after displaying a gun and a knife. Although Benitez described the event in detail, he gave no description of the robbers beyond differentiating between them as "older" and "younger." Benitez made an in-court identification of defendant and [petitioner], and he testified to his prior identification of the two men during separate lineups at the police station.
>
> The defense theory was misidentification. Aware that incident reports completed by a police officer and a Housing

(continued...)

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[2](...continued)
Authority detective contained descriptions of the robbers obtained from Benitez that varied from the physical attributes of defendant and [petitioner], and assuming that these incident reports constituted all the Rosario material to which the defendant was entitled, defense counsel contented himself with eliciting a detailed description of the two robbers from Benitez. He later called the police officer and the Housing Authority detective, as witnesses for defendant, and questioned them regarding the descriptions of the robbers contained in their incident reports in an attempt to impeach Benitez's testimonial descriptions by showing the inconsistent descriptions contained in the incident reports.

On cross-examination and over defense counsel's repeated objections . . . , the prosecutor was permitted to elicit testimony that both officers had kept memo books containing notes of their investigation of the Benitez complaint. . . . [B]y their testimony they confirmed that

(continued...)

reconsideration of the court's denial of leave to appeal. Leave to appeal was again denied. People v. Mayo, 507 N.E.2d 1101 (N.Y. 1987). Petitioner then sought relief in the Appellate Division, First Department, asserting that he was denied effective assistance of appellate counsel. The Appellate Division denied petitioner's

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[2](...continued)
Benitez's description of the robbers at trial and his description of them made during their investigation was consistent. The discrepancies in the incident reports, they testified, were due to errors in their own transcription. . . . Apparently, the books were never physically delivered to defendant's counsel before all parties had rested and the evidence was closed. Defense counsel then moved for a mistrial and the Trial Judge belatedly recognized that the memo books constituted Rosario material that had not been provided to defendant.

People v. Ranghelle, 503 N.E.2d 1011, 1014-15 (N.Y.. 1986).

application for a writ of error coram nobis on November 17, 1987. People v. Mayo, 520 N.Y.S.2d 721 (N.Y. App. Div. 1st Dep't 1987). The New York Court of Appeals dismissed petitioner's application for leave to appeal by order dated January 4, 1988. People v. Mayo, 520 N.E.2d 559 (N.Y. 1988). Petitioner filed the instant petition on June 17, 1988. In the petition, petitioner raises the same grounds for relief he urged in the Appellate Division: (i) failure of the state to turn over exculpatory evidence; (ii) illegal search; (iii) impermissibly suggestive lineup; (iv) improper remarks of the prosecutor in summation; (v) evidence of uncharged crimes wrongly admitted; (vi) improper Sandoval ruling; (vii) insufficiency of the evidence; and (viii) excessive sentence. In addition,

petitioner claims that he received ineffective assistance of appellate counsel based on the allegation that his counsel neglected to raise the issue of the prosecution's failure to produce certain materials, required to be furnished under People v. Rosario,[3] 173 N.E.2d 881 (N.Y.), cert. denied, 368 U.S. 866 (1961), before the parties had rested and the evidence was closed.

By Report and Recommendation dated October 16, 1990, Magistrate Judge Leonard Bernikow recommended that the petition be

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[3]The Rosario rule has since been codified in section 240.45 of the New York State criminal procedure law. This provision, which became effective on january 1, 1980, does not require the adverse party to make a request before receiving Rosario materials and obligates the prosecution to turn over such materials, in a jury trial, before proceeding with the prosecutor's opening address. N.Y. Crim. Proc. Law § 240.45(1) (McKinney 1993).

dismissed except with respect to petitioner's claim of ineffective assistance of appellate counsel. By Memorandum and Order dated April 22, 1991, the Court accepted Magistrate Judge Bernikow's recommendation. Mayo v. Henderson, No. 88-4239, 1991 U.S. Dist. LEXIS 6312, at *1 (S.D.N.Y. Apr. 22, 1991). In that Order, the Court instructed that a hearing be held before Magistrate Judge Bernikow concerning petitioner's claim of ineffective assistance of appellate counsel. Such a hearing was held on May 28, 1992.[4] On March 31, 1993, Magistrate Judge Bernikow issued the instant Report and

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[4]While petitioner was apparently paroled some time prior to this hearing, his petition is not moot because he may suffer collateral consequences as a result of his conviction. Carafa v. La Vallee, 391 U.S. 234, 239-40 (1968).

Recommendation (the "Report"), which is the subject of respondents' objections, concerning petitioner's remaining claim. For the reasons that appear below, the Court adopts the Report in its entirety, and the writ is granted.

DISCUSSION

A prerequisite to federal habeas corpus review of a state court conviction is that a petitioner exhaust all available state remedies with respect to each claim he or she presents in his or her petition. Rose v. Lundy, 455 U.S. 509, 510 (1982); 28 U.S.C. § 2254 (b), (c) (1988). Respondents do not dispute that petitioner has exhausted his state court remedies.

Pursuant to Rule 72(b) of the Federal Rules of Civil Procedure and 28 U.S.C. § 636(b)(1), litigants wishing to object to

recommendations of a Magistrate Judge, submitted in a report to a District Judge, have ten days within which to file such objections after being served with report. "Failure to object within the allotted ten days results in a waiver of further judicial review." Frank v. Johnson, 968 F.2d 298, 299 (2d Cir.), cert. denied, ____ U.S. ___, 113 S. Ct. 825 (1992). Timely objections were received by the Court from respondents. Based on the Court's de novo review of the matters to which objections have been filed, the Court adopts the Report in its entirety.

Ineffective Assistance of Appellate Counsel

"A defendant challenging his conviction based on a claim of inadequate representation bears the burden of showing that his attorney's performance 'fell

below an objective standard of reasonableness' . . . and that but for this error, there is a 'reasonable probability' the outcome would have been different." Abdurrahman v. Henderson, 897 F.2d 71, 74 (2d Cir. 1990) (quoting Strickland v. Washington, 466 U.S. 668, 688, 694 (1984)). To demonstrate deprivation of the Sixth Amendment right to effective counsel, petitioner must "show (1) that a counsel's performance was so deficient and counsel's errors were so serious that he or she was not functioning as the 'counsel' guaranteed by the Sixth Amendment; and (2) that counsel's deficient performance prejudiced petitioner's defense so seriously that it 'deprive[d] [petitioner] of a fair trial, a trial whose result is reliable.'" Cuevas v. Henderson, 801 F.2d 586, 589 (2d

Cir. 1986) (citations omitted), cert. denied, 480 U.S. 908 (1987). Indigent defendants do not have "a constitutional right to compel appointed counsel to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points." Jones v. Barnes, 463 U.S. 745, 751 (1983). "The federal constitutional right to effective assistance of counsel may be violated by an attorney's failure to raise a meritorious state law claim or defense." Claudio v. Scully, 982 F.2d 798, 803 n.5 (2d Cir. 1992), cert. denied, _____ U.S. ____, 1993 U.S. LEXIS 3277 (May 17, 1993). The Strickland test also applies to claims directed at inadequate appellate representation. Abdurrahman, 897 F.2d at 74. The Strickland standard is quite

deferential, not rising to constitutional proportions unless counsel's error is so egregious as to amount to a failure to provide minimal professional representation.

While noting that "the evidence at the hearing did not establish the practice of the defense bar during the relevant period" (Report at 10), Magistrate Judge Bernikow noted that "the case law available at the time in question must be examined to determine if counsel's decision to forego the Rosario claim amounted to professional incompetence." (Id). The Report concludes, after determining that petitioner's Rosario claim would have succeeded but for appellate counsel's error, that "counsel did not have to deduce the result in the Court of Appeals . . . [and] no tactical

reason appears to justify appellate counsel's failure to raise the Rosario issue." (Report at 13.) The Court agrees. Despite respondents' arguments to the contrary,[5] the Court shares Magistrate Judge Bernikow's view that "[p]rior to 1984, the Court of Appeals had indicated that Rosario violations were not amenable to harmless error analysis." (Report at 10). For example, in People v. Mattiace Industries, Inc., the Court of Appeals explicitly stated that "[r]eversal is mandated, however, because counsel for the defense was entitled to the prior

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[5]"At the time of petitioner's appeal, the Appellate Divisions for the First and Second Departments thought that a harmless error analysis could be applied to unintentional Rosario violations." (Resp'ts Mem. at 11). "Two experts in new York law . . . maintain that the Rosario per se error rule was not clearly established until after petitioner's appellate attorney had argued petitioner's appeal." (Id. at 12.)

statements made by the witnesses for the purposes of impeachment. The denial of this request was improper. . . . This error cannot be deemed harmless." 417 N.E.2d 563, 564 (N.Y. 1980) (citations omitted); see also People v. Consolazio, 354 N.E.2d 801, 805 (N.Y. 1976) ("We thus reject arguments that consideration of the significance of a witness' prior statements can result in a finding of harmless error"), cert. denied, 433 U.S. 914 (1977). The possibility that the Appellate Division, First Department, would reject petitioner's Rosario claim is of no import. Appellate counsel should have preserved his objections for appeal to the Court of Appeals because that court

had indicated that Rosario violations constitutes per se error.[6]

Respondents argue that the Report fails to consider Lockhart v. Fretwell, ___ U.S. ____, 113 S. Ct. 838 (1993). According to respondents, Fretwell "significantly refined the analysis that courts must use to evaluate whether an attorney's alleged errors 'prejudiced' a defendant under Strickland." (Resp'ts Mem. at 5.) Petitioner contends that in Fretwell "the Supreme Court rejected a habeas petitioner's claim that he was prejudiced by his lawyer's failure to raise a meritorious issue at trial, since by the time the habeas petition was

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[6]The Court emphasizes that the instant determination in no way implies that a violation of Rosario constitutes per se ineffective assistance of counsel. See Colson v. Mitchell, 798 F. Supp. 966, 972-73 (E.D.N.Y. 1992).

decided the law had changed, and the issue was no longer meritorious." (Pet'r Mem. at 9.) The Court agrees with petitioner that Fretwell has little relevance to the instant case. While Fretwell explains that "an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective," Fretwell, 113 S. Ct. at 842, it does not alter the prejudice component of the Strickland test which requires that the alleged ineffectiveness of counsel deprive petitioner of a substantive or procedural right to which the law entitles him. Petitioner;s appellate counsel deprived petitioner of such a right by failing to preserve petitioner's Rosario claim for subsequent appeal. Under the

law of the State of New York at the time, petitioner was entitled to a new trial.

CONCLUSION

For the foregoing reasons, the Court adopts the Report in its entirety with the exception of a portion of the Report's recommended remedy. Petitioner's petition for a writ of habeas corpus is granted, unless the state affords petitioner an opportunity to present his Rosario claim to the appropriate New York State court within ninety days of the date of this Order, for consideration as if the Rosario issue had been properly presented, and with such appeal(s), if any, as would be provided by New York State law were the presentation of the Rosario claim timely, or in the alternative, the state provides

petitioner a new trial within ninety days of the date of this Order.

Dated: New York, New York
June 14, 1993

SO ORDERED.

LAWRENCE M. McKENNA
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MAURICE MAYO,	:	
	:	
Petitioner,	:	REPORT AND RECOMMENDATION
	:	
-against-	:	
	:	88 Civ. 4239 (LMM)
ROBERT J. HENDERSON,	:	
	:	
Respondent.	:	

TO THE HONORABLE LAWRENCE M. McKENNA, U.S.D.J.:

Maurice Mayo pro se petitioned this court for a writ of habeas corpus, pursuant to 28 U.S.C. §2254. Judge Wood, to whom this was initially assigned, referred the petition to me for report and recommendation. See 28 U.S.C. §636(b)(1)(B). By report and recommendation dated October 16, 1990, I recommended that the petition be dismissed with the exception of petitioner's claim of ineffective assistance of counsel. I

also recommended that counsel be appointed to represent petitioner and that a hearing be held on that claim. By opinion and order dated April 22, 1991, the court accepted the report and recommendation.

Background

After a jury trial in New York State Supreme Court, New York County, on March 18, 1981, petitioner and a co-defendant were found guilty of robbery in the first degree and two counts of robbery in the second degree. The trial court sentenced petitioner on October 16, 1981 as a predicate felon to an indeterminate prison term of from ten to twenty years.[1]

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[1]Petitioner was paroled some time prior to the May 28, 1992 hearing. This fact does not divest the court of jurisdiction. See Carafas v. LaVallee, 391 U.S. 234, 239-40 (1968); Bagby v. Kuhlman, 742 F. Supp. 137, 141 n. 6 (continued...)

On April 12, 1984, the Appellate Division, First Department, unanimously affirmed petitioner's conviction without opinion. People v. Mayo, 100 A.D.2d 983, 474 N.Y.S.2d 157 (1st Dep't 1984). The New York Court of Appeals (Kaye, J.) denied leave to appeal on May 30, 1984. People v. Mayo, 62 N.Y.2d 808, 477 N.Y.S.2d 1033 (1984). After the Court of Appeals reversed the conviction of petitioner's co-defendant, see People v. Ranghelle ("People v. Buster"), 69 N.Y.2d 56, 511 N.Y.S.2d 580 (1986), for failure to turn over Rosario[2] material, petitioner

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[1](...continued)
(S.D.N.Y. 1990), rev'd. on other grounds, 932 F.2d 131 (2d Cir. 1991), cert. denied, 112 S. Ct. 341, 116 L.Ed2d 281 (1991).

[2]People v. Rosario, 9 N.Y.2d 286, 213 N.Y.S.2d 448 (1961), cert. denied, 368 U.S. 866 (1961), requires the prosecutor to provide the defendant with the prior statements of a prosecution witness prior to cross-examination.

sought reconsideration of the denial of leave to appeal. Judge Kaye, however, again denied leave to appeal. People v. Mayo, 69 N.Y.2d 883, 515 N.Y.S.2d 1031 (1987). Petitioner then moved in the Appellate Division for relief, arguing ineffective assistance of counsel. The Appellate Division denied petitioner's motion on the ground that the order of the Appellate Division was not appealable.

Petitioner in this court raised the same eight grounds for relief he urged in the Appellate Division (1) insufficiency of the evidence; (2) failure of the state to turn over exculpatory evidence; (3) illegal search; (4) impermissibly suggestive lineup; (5) improper remarks of the prosecutor in summation (6) evidence of uncharged crimes wrongly admitted; (7) improper Sandoval ruling and (8) excessive

sentence. Petitioner also successfully moved in this court to add a claim for ineffective assistance of appellate counsel.

The New York Court of Appeals outlined the facts underlying petitioner's conviction when it reversed his co-defendant's conviction:

> All three charges stemmed from a single incident during which Aquilino Benitez, a student attending Columbia University, was robbed by two men in the elevator of his apartment building. At trial, Benitez was the chief witness for the prosecution. He testified that on the day in question two men entered the elevator with him at the ground floor, stopped it at the sixth floor, and then robbed him of jewelry and money after displaying a gun and knife. Although Benitez described the event in detail, he gave no description of the robbers beyond differentiating between them as "older" and "younger." Benitez made an in-court identification of defendant and [petitioner], and he testified to his prior identification of

> the two men during separate lineups at the police station.

People v. Buster, 511 N.Y.S.2d at 583. In addition to the facts cited by the Court of Appeals, the prosecution presented other evidence, including the fact that petitioner was arrested carrying a silver colored starter's pistol that Benitez later identified as the weapon used to rob him, and that petitioner was wearing a distinctive ring that Benitez said belonged to him and was stolen during the robbery.

Petitioner presented no evidence at trial. His co-defendant, however, called two police officers as his witnesses. As the Court of Appeals stated, Buster's trial counsel knew that the incident reports filed by the police officers contained descriptions of the robbers that differed from the physical characteristics

of the defendants. 555 N.Y.S.2d at 583. Thus, he called the officers to question them concerning the descriptions contained in the incident reports to undermine the Benitez's testimonial descriptions. Id. On cross-examination, however, the prosecutor was permitted to elicit testimony that both officers had kept memo books with notes concerning the Benitez's complaint. Id. The testimony of the officers confirmed that the victim's description of the robbers at trial was consistent with his description at the investigation. Id. at 583-84. The officers explained that the discrepancies in the incident reports were due to errors in their own transcription of the Benitez's statement from the memo books to the incident reports. Id. at 594.

At trial, Buster's counsel moved for a mistrial, arguing that the memo book entries constituted Rosario material. He said that "on the basis of entries that are made in memo book entries that were never given to me, [the prosecutor] turned around and discredited witnesses who I might never have called had I been aware that there were inconsistent statements in their prior writings." Tr. 303.[3] Petitioner's counsel joined in the application for a mistrial.

The court said that there was "no question" that defendants were entitled to the material, and that prosecutor's failure to turn the memo book entries over was "inexcusable" and "shocking." Tr. 303-04. Nonetheless, the court denied

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[3]"Tr." followed by a page number refers to the trial transcript.

defendants' application for a mistrial "without waiving any of their rights with respect to that denial." Tr. 305. She instructed the jury "that for the purposes of this trial there is nothing inconsistent in any of the memo books with the direct testimony of the officers." Tr. 306.

On direct appeal, petitioner's counsel omitted the Rosario issue, raising instead eight other claimed errors. He mentioned, in his statement of facts, that he had unsuccessfully sought dismissal at trial based on the alleged Rosario violation. See Petitioner's Brief to the Appellate Division at 35 (hereinafter "Appellate Brief"). As note, the First Department affirmed without opinion, and the Court of Appeals denied leave to appeal.

Petitioner's co-defendant, Buster, also appealed to the First Department. Although he explicitly asserted the Rosario issue, his conviction, too, was affirmed without opinion. People v. Buster, 110 A.D.2d 1093, 488 N.Y.S.2d 942 (1st Dep't 1985). The Court of Appeals reversed, however, holding that Rosario violations require per se reversal. See Buster, 511 N.Y.S.2d at 585.

After the Court of Appeals reversed Buster's conviction, petitioner sought reconsideration of the First Department's affirmance. The Court of Appeals again denied leave to appeal, according to petitioner, "[b]ecause of appellate counsel's failure to raise the Rosario claim in a timely manner." Report and Recommendation at 23. Accordingly, petitioner argues that his counsel's

failure to raise the Rosario claim on his initial appeal fell below the constitutional standard for effective assistance of counsel. He adds that the result of his state criminal proceedings would have been different but for counsel's error. See id.

Pursuant to the court's order, I conducted a hearing "concerning the reasons counsel failed to raise the Rosario claims and the practice of the New York defense bar regarding such claims." Report and Recommendation at 27; see Memorandum and Order at 5. The parties stipulated that "if [petitioner's appellate counsel] were called to testify in this case he would testify that he had no specific recollection of preparing the brief in the case People v. Mayo. Further, he had no recollection as to why

he did not raise an issue based on People v. Rosario." H.5.[4]

The petitioner called Professor Stanley Neustadter, an appellate criminal attorney and professor of law, as its expert witness. Professor Neustadter testified that "no reasonable ground" existed to justify appellate counsel's failure to raise the Rosario issue. H. 37. He suggested that appellate counsel's first point, a Brady issue, would have cohered with the Rosario question as indicative of a pattern of non-disclosure by the District Attorney. H. 35. He noted that "there was some cloud of inconsistent decisions" on the per se reversibility aspect of the Rosario rule, but he pointed out that an appellate

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[4]"H." followed by a page number refers to the May 28, 1992 hearing.

advocate does not "brief only issues that come certified in advance as reversible." H. 42. However, Professor Neustadter was unable to recall the practice of the defense bar in 1984 with regard to Rosario claims in the Appellate Division. H. 51-52.

The state called, as its expert witness, Mark Dwyer, Chief of the Appellate Bureau for the New York District Attorney. Mr. Dwyer testified that he "[didn't] think awareness of the Court of Appeals doctrine revealed in [People v.] Ranghelle and [People v.] Jones would have been general throughout the defense bar" at the time in question. H. 64. Mr. Dwyer also suggested that Buster had a better claim of prejudice resulting from the non-disclosure than petitioner because

Buster's witnesses had been impeached by the memo book entries. H. 72-73.

Discussion

To succeed on a claim of ineffective assistance of counsel, petitioner must show that his counsel's performance fell below "an objective standard of reasonableness" under "prevailing professional norms" and that "but for counsel's unprofessional conduct, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 688 (1984). The Second Circuit has applied the two-prong Strickland test to assess the effectiveness of appellate counsel. Claudio v. Scully, 982 F.2d 798, 803 (2d Cir. 1992) (citing Abdurrahman v. Henderson, 897 F.2d 71, 74 (2d Cir. 1990).

Under Strickland, "judicial scrutiny of counsel's performance must be highly deferential." Strickland, 466 U.S. at 688. Petitioner must thus overcome a strong presumption that appellate counsel's conduct constituted sound appellate strategy. See id. at 689; Mills v. Scully, 826 F.2d 1192, 1197 (2d Cir. 1987). It is not enough to show that counsel erred; petitioner need demonstrate "that the errors were not within the realm of reasonableness under the professional norms prevailing at the time of trial." Minor v. Henderson, 754 F. Supp. 1010, 1016 (S.D.N.Y. 1990) (citing Strickland, 466 U.S. 687-88). The "reasonableness of the attorney's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light

of all the circumstances." Kimmelman v. Morrison, 477 U.S. 365, 381 (1986).

Petitioner satisfies the second prong of the Strickland test. That is, a reasonable probability exists that petitioner's Rosario claim would have succeeded but for counsel's alleged error. See Strickland, 466 U.S. at 694; United States ex rel. Roche v. Scully, 739 F.2d 739, 742 (2d Cir. 1984). The Court of Appeals, as indicated, reversed the conviction of petitioner's co-defendant. It found that the memo books should have been produced because they contained statements and descriptions supplied by the complainant. The court also noted that there was "no evidence in the record that the books were ever delivered to defense counsel," thus vitiating any claims that the failure to produce was

merely a delay not prejudicing the defense. People v. Buster, 511 N.Y.S.2d at 586. The court further rejected the argument that the memo book entries were duplicative equivalents of other information provided. Id.

In view of the finding of prejudice, the remaining question--and a close one--is whether counsel's failure to raise the Rosario issue on direct appeal "fell below an objective standard of reasonableness under prevailing professional norms." Id. Petitioner proffers two arguments in support of his contention that appellate counsel's performance was deficient. First, he alleges that the Rosario argument was so obvious and significant that no competent attorney should have missed it. Petitioner's Memorandum at 7. Second, he contends that appellate counsel

confined his Appellate Brief to issues far less likely to compel reversal than the Rosario violation. Id. at 15.

Counsel's omission of the "obvious" Rosario issue

In considering ineffective assistance claims, the reviewing court is required "to eliminate the distortions of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689; Moore v. Deputy Commissioner(s) of SCI-Huntingdon, 946 F.2d 236, 246 (3rd Cir. 1991). Unfortunately, the evidence at the hearing did not establish the practice of the defense bar during the relevant period. Not only that, appellate counsel's inability to recall petitioner's appeal

frustrated the purpose of the hearing, i.e., to determine why he had failed to raise the Rosario question. Thus, the case law available at the time in question must be examined to determine if counsel's decision to forego the Rosario claim amounted to professional incompetence. See Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986); see also United States ex rel. Roche v. Scully, 739 F.2d at 743.

Prior to 1984, the Court of Appeals had indicated that Rosario violations were not amenable to harmless error analysis, see, e.g. People v. Mattiace Industries, Inc. 52 N.Y.2d 739, 436 N.Y.S.2d 269, 270 (1980); People v. Consolazio, 40 N.Y.2d 446, 387 N.Y.S.2d 62, 66 (1976), cert. denied, 433 U.S. 914 (1977), as had the First Department. See, e.g., People v. Flores, 57 A.D.2d 783, 394 N.Y.S.2d 670,

671 (1st Dep't 1977). Given that the trial court had expressly found that defendants were entitled to the withheld memo book entries, Tr. 303, appellate counsel's decision not to raise this argument appears questionable.

The state contends that the Appellate Division had applied harmless error analysis to Rosario claims notwithstanding the Court of Appeals's pronouncements on the subject. It further points out that at least one commentator remarked that "it was not until 1986 that it became absolutely clear that any prosecutorial failure whatsoever to produce Rosario material is per se cause for vitiating the conviction." See Preiser, Practice Commentary, McKinney's Cons. Laws of N.Y., Book 11A (1990 Cumulative Annual Pocket

Part), Criminal Procedure Law 240.45, p. 171.

True, the Appellate Division had applied harmless error analysis to a Rosario violation in People v. Jones, decided after petitioner's initial appeal. See Jones, 124 A.D.2d 1076, 507 N.Y.S.2d 781 (1986) (unpublished opinion), vacated, 128 A.D.2d 405, 512 N.Y.S.2d 691, 692 (1st Dep't 1987), aff'd., 70 N.Y.2d 547, 523 N.Y.S.2d 53, 55-56 (1987); see also People v. Perez, 100 A.D.2d 366, 474 N.Y.S.2d 767, 774 (2d Dep't 1984), rev'd., 65 N.Y.2d 154, 490 N.Y.S.2d 747 (1985). Nonetheless, the Court of Appeals had indicated that Rosario violations constituted per se error. As Professor Neustadter testified, effective appellate advocates are not limited to briefing issues certain to win. H. 42. In view of

the Court of Appeals's and First Department's decisions, the Rosario issue had at least "a reasonable probability" of success. See Claudio, 982 F.2d at 803. And even if counsel believed that he stood little chance of reversal in the Appellate Division, he should have preserved his objections for appeal to the Court of Appeals, see United States ex rel. Barnard v. Lane, 819 F.2d 798, 805 (7th Cir. 1987), which had demonstrated receptivity to Rosario arguments. See Claudio, 982 F.2d at 805.

The First Department's affirmance of Buster's conviction, despite his inclusion of the Rosario issue, does not compel a contrary conclusion. Any doubts concerning the propriety of holding counsel ineffective for neglecting arguments rejected by an intermediate

state appellate court were put to rest in Claudio.

Indeed, Claudio supports petitioner's contention that counsel was ineffective. Claudio made an inculpatory statement on the advice of counsel prior to commencement of formal criminal proceedings. 982 F.2d at 800. The trial court suppressed his statement because it believed that Claudio was ill-advised by counsel. Id. The Appellate Division reversed, holding that Claudio's Sixth Amendment right to counsel had not yet attached when he made his statement. Id. Although Claudio had not pressed his claim with references to state law, the Second Department considered sua sponte the issue under the state constitution as well as under federal law. Id. Despite the fact that the Appellate Division spontaneously

addressed the state constitutional element of Claudio's claim, his appellate counsel failed to raise the state constitution argument to the Court of Appeals. Id. at 801 n. 2.

The Second Circuit found that a reasonable probability existed that the argument that "a state constitutional right to effective assistance of counsel begins once counsel has been retained in response to a police investigation" would have succeeded in the New York Court of Appeals. 982 F.2d at 805. It also held that counsel's failure to raise such a claim, given the New York Court of Appeals's history of broad readings of the right to counsel under the state constitution, was constitutionally defective. Id. The Appellate Division had held that under state law, the right

to counsel attaches at that early stage, but placed no duty on law enforcement personnel to oversee the competency of the legal advice rendered. Id. at 800-01. As the state here recognizes, the Second Circuit faulted counsel for not deducing that the Appellate Division had misinterpreted the applicable state law and thus should not have abandoned the claim in the Court of Appeals.

In the present case, counsel did not have to deduce the result in the Court of Appeals. That court, as noted, had already indicated its unwillingness to apply harmless error analysis to Rosario violations. See, e.g, Mattiace Industries, Inc., 436 N.Y.S.2d at 270; Consolazio, 387 N.Y.S.2d at 66.

Moreover, no tactical reason appears to justify appellate counsel's failure to

raise the Rosario issue. See Fagan v. Washington, 942 F.2d 1155, 1157 (7th Cir. 1991); see also Claudio, 982 F.2d at 805. Counsel's inability to recall petitioner's appeal prevents us from learning why he failed to include the Rosario claim. Also, a belief that a trial error would be deemed harmless would not necessarily excuse counsel from briefing the issue on appeal. In Johns v. Coughlin, 750 F. Supp. 76, 78 (E.D.N.Y. 1990), appellate counsel declined to brief an evidentiary issue on the assumption that "'the concept of harmless error ... might be appropriate to this issue.'" The court disagreed, finding evidence in the record suggesting that counsel's characterization of the error as harmless was not entirely accurate. Accordingly, it found appellate

counsel's assistance constitutionally defective.

In sum, with the principles of Claudio in mind, I find that counsel should not have ignored the Rosario violation.

Inclusion of weaker arguments

The state argues that Professor Neustadter's opinion concerning the general quality of appellate counsel's statement of facts and legal claims is irrelevant to the issues the hearing was intended to address. Granted, I had held the hearing to assess the reason counsel failed to raise the Rosario claim and also to determine the practice of the defense bar regarding these claims. Nevertheless, one cannot consider the reasonableness of

counsel's failure to raise the disputed claim without considering the merits of the other arguments pressed on appeal. If he raised strong arguments, then the omission of the Rosario claim would not be serious. But, as Professor Neustadter noted, with the exception of the first claim, the seven other issues appellate counsel raised were a great deal weaker than the Rosario claim. For example, appellate counsel questioned the trial judge's rulings at a suppression hearing. See Appellate Brief at 43. However, as petitioner points out, the judge had explicitly rejected petitioner's testimony as incredible, and accepted that of the police officers involved. Appellate counsel failed to argue that the court erred in crediting the testimony of the police. Instead, he focused on the

illegal character of the search, offering a version of the facts that the trial judge had dismissed at the hearing as not credible. Petitioner argues, not without force, that the likelihood of the appellate court's reversing the trial judge's credibility determination was almost non-existent. In addition, counsel raised a sufficiency of the evidence claim. Yet he failed to note that when petitioner was arrested, he was in possession of a ring with the victim's nickname engraved on it.

Appellate counsel's choice of issues suggests that his representation fell below constitutional standards. Ignoring the issue that eventually prevailed in Buster's case, counsel instead concentrated on questions of dubious legal validity. "[W]hen ignored issues are

clearly stronger than those presented ... the presumption of effective assistance will be overcome." Gray, 800 F.2d at 646; cf. Sharp v. Puckett, 930 F.2d 450, 452-53 (5th Cir. 1991).

Of course, counsel is not required to press every nonfrivolous claim urged by his client. See Jones v. Barnes, 463 U.S. 745, 751 (1983). Nor is counsel ineffective for declining to raise every conceivable issue lurking in the trial transcript. See Id. at 754, Randolph v. Delo, 952 F.2d 243, 247 (8th Cir. 1991), cert. denied, 112 S. Ct. 1967, 118 L.Ed. 2d 568 (1992); see also United States ex rel. Roche v. Scully, 739 F.2d at 744; DeVine v. Sullivan, 775 F. Supp. 129, 133 (S.D.N.Y. 1991), aff'd., 969 F.2d 1042 (2d Cir. 1992), cert. denied 113 S. Ct. 614, 121 L. Ed. 548 (1992). A contrary rule

would risk indulging "in the very kind of hindsight, with its distorting effects, condemned by the court in Strickland." United States ex rel. Roche v. Scully, 739 F.2d at 744. That the omitted argument ultimately proves meritorious does not automatically render counsel's assistance ineffective. See Cantone v. Superintendent, New York Correctional Facility, 759 F.2d 207, 218-219 (2d Cir. 1985), cert. denied, 474 U.S. 835 (1985); Curzi v. United States, 773 F. Supp. 535, 543-44 (E.D.N.Y. 1991), aff'd on other grounds sub nom. Laaman v. United States, 973 F.2d 107 (2d Cir. 1992), cert. denied, 122 L. Ed.2d 746, 61 U.S.L.W. 3584 (1993); see also Indiviglio v. United States, 612 F.2d 624, 629 (2d Cir. 1979), cert. denied, 445 U.S. 933 (1980).

If, however, appellate counsel concentrates on weak issues to the detriment of a potentially meritorious claim, he diminishes the brief's effectiveness. See Jones v. Barnes, 463 U.S. 745, 752-53 (1983). Counsel never raised his best hope for reversal. Although apparently aware of the Rosario violation, he asserted arguments having less chance of success. Counsel's questionable choice of issues supports the conclusion that his assistance cannot withstand constitutional scrutiny.

Conclusion

For the reasons stated, I recommend that the writ be granted, unless the state

affords petitioner an opportunity to present the Rosario claim to the New York Court of Appeals within the sixty days of a final judgment in this matter. Claudio, 982 F.2d at 806.[5]

Copies of this report have been mailed this date to the parties listed below, who are hereby advised of their right to file objections to this report with Judge McKenna on or before April 19, 1993. See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72, 6(a), 6(e). Failure to object to this report by that date will preclude

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[5]In Claudio, the New York Court of Appeals did not consider the state constitution argument because Claudio failed to raise the issue there or in the Appellate Division. 982 F.2d at 801 n. 2. A similar situation exists here. As noted, petitioner believes that the Court of Appeals refused to consider the Rosario question because it had not been raised in a timely manner.

appellate review. Small v. Secretary, 892 F.2d 15, 16 (2d Cir. 1989).

Dated: New York, New York
March 31, 1993

Respectfully submitted,

LEONARD BERNIKOW
United States Magistrate Judge

cc: David A. Lewis, Esq.
The Legal Aid Society
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MAURICE MAYO,	:	
	:	
Petitioner,	:	88 Civ. 4239 (LMM)
- against -	:	
	:	MEMORANDUM
ROBERT J. HENDERSON, Superintendent, et ano.,	:	AND ORDER
	:	
Respondents.	:	

McKENNA, D.J.

This petition for a writ of habeas corpus was referred to Magistrate Judge Leonard Bernikow for recommendation for disposition.

By Report and Recommendation dated October 16, 1990, Magistrate Judge Bernikow recommended that the petition be dismissed except with respect to petitioner's claim of ineffective assistance of appellate counsel, as to

which he recommended that a hearing be held before him concerning the reasons appellate counsel failed to raise the issue of the prosecution's failure to make certain materials, required to be produced under People v. Rosario, 9 N.Y.2d 286, 213 N.Y.S.2d 448, cert. denied 368 U.S. 866 (1961), available to the defense until after trial; he also recommended that counsel be appointed to represent petitioner at the hearing. Respondents have filed objections to this portion of the Report and Recommendation.

After de novo determination of the portion of the Report and Recommendation objected to, the Court accepts Magistrate Judge Bernikow's recommendation.

Petitioner and a co-defendant, John Buster, were found guilty by a jury on March 18, 1981, in the Supreme Court, New

York County, of robbery in the first and second degrees. The judgment of petitioner's conviction, entered on October 16, 1981, was affirmed, without opinion, by the Appellate Division, First Department. 100 A.D.2d 983, 474 N.Y.S.2d 157 (April 12, 1984), and leave to appeal to the Court of Appeals was denied on May 30, 1984. 62 N.Y.2d 808, 477 N.Y.S.2d 1033.

Petitioner's co-defendant's conviction was also affirmed, without opinion, by the Appellate Division, First Department. 110 A.D.2d 1093, 488 N.Y.S.2d 942 (April 23, 1985). Buster's case, however, reached the Court of Appeals, which reversed, and granted Buster a new trial. People v. Buster, 69 N.Y.2d 56, 511 N.Y.S.2d 580 (1986). The Court of Appeals said:

> When the People delay in producing Rosario material, the reviewing court must ascertain whether the defense was substantially prejudiced by the delay. When, however, the prosecution fails completely in its obligation to deliver such material to defense counsel, the courts will not attempt to determine whether any prejudice accrued to the defense. The failure constitutes per se error requiring that the conviction be reversed and a new trial ordered.

69 N.Y.2d at 63. 511 N.Y.S.2d at 585. (Citation omitted.)

After the Buster decision was handed down, counsel for petitioner promptly sought reconsideration of the denial of petitioner's application for leave to appeal to the Court of Appeals, but leave to appeal was again denied. 69 N.Y.2d 883, 515 N.Y.S.2d 1031. Petitioner, now pro se, moved "in the nature of a writ of error coram nobis, for a review of his claim ineffective assistance of appellate

counsel, and for other related relief," but, by order dated November 17, 1987, that motion was denied. The Court of Appeals denied leave to appeal from that denial by order dated January 4, 1988, on the ground that the order was not appealable.

Respondents' objection is, in essence, that the Magistrate Judge ignored the Supreme Court's caution, in Strickland v. Washington, 466 U.S. 668 (1984), that:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess ccunsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.

466 U.S. at 689. (Citation omitted.)

Respondents argue that:

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> (1) neither the substantive Rosario issue, nor the non-applicability of harmless error analysis had been clearly established by existing law; (2) the Rosario claim, when later made by petitioner's co-defendant, was found meritless by an unanimous intermediate appellate court; and (3) there is no suggestion that the attorney's performance was not otherwise capable, complete, and diligent.

There is no suggestion in the Report and Recommendation, of course, that appellate counsel's performance was in any way defective other than in failing to raise Rosario issue; indeed, it does not say that counsel's performance was defective in that regard, either, but only recommends that the matter warrants a hearing. And the fact that the Appellate Division, in Buster, affirmed, may well have some bearing on the issue whether counsel in the present case should have thought to raise the Rosario issue, but it

is hardly, given what the Court of Appeals did in Buster, dispositive. The real issue is the first, whether counsel, on the state of the law as it existed at the time, should have thought to raise the Rosario issue, when judged against "an objective standard of reasonableness" under "prevailing professional norms," but in a "highly deferential manner." Strickland, 466 U.S. at 688-689.

It is far from inappropriate to hold a hearing on the issue. In Strickland, the Supreme Court noted that "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." 466

U.S. at 689. (Emphasis added). The essential historical reconstruction suggested can best be done as recommended by the Magistrate Judge, at a hearing, with appointed counsel representing petitioner, rather than on briefs only, and petitioner appearing pro se. See also, United States v. Aulet, 618 F.2d 182, 186 (2d Cir. 1980).

United States ex rel. Roche v. Scully, 739 F.2d 739 (2d Cir. 1984), does not require that a hearing not be held. There, in a two-to-one decision, the court was able to find, without a hearing, that the petitioner did receive reasonably competent counsel on appeal; it certainly did not hold that it would have been error to hold a hearing as recommended here by the Magistrate Judge.

After review of that portion of Magistrate Judge Bernikow's Report and Recommendation to which objection was taken, and de novo determination thereof, the Court accepts the recommendation, and the petition is dismissed, except with respect to the claim of ineffective assistance of appellate counsel, as to which a hearing will be held before the Magistrate Judge, as scheduled by him, with counsel to be appointed by him to represent petitioner at the hearing.

Dated: New York, New York
April 22, 1991

SO ORDERED.

LAWRENCE M. McKENNA
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MAURICE MAYO,	:	REPORT AND RECOMMENDATION
Petitioner,	:	
-against-	:	88 Civ. 4239 (LMM)
ROBERT J. HENDERSON, Superintendent, et ano.,	:	
Respondents.	:	

TO THE HONORABLE LAWRENCE M. McKENNA, U.S.D.J.:

Maurice Mayo pro se petitions this court for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254. Judge Wood, to whom this case was initially assigned, referred the petition to the undersigned for report and recommendation. See 28 U.S.C. §636(b)(1)(B).

Background

After a jury trial in New York State Supreme Court, New York County, on March

18, 1981, petitioner and a co-defendant were found guilty of robbery in first degree and two counts of robbery in the second degree. The trial court sentenced petitioner on October 16, 1981, as a predicate felon to an indeterminate prison term of from ten to twenty years. Petitioner is serving that sentence now at the Auburn Correctional Facility.

On April 12, 1984, the Appellate Division, First Department, unanimously affirmed petitioner's conviction without opinion. People v. Mayo, 100 A.D.2d 983, 474 N.Y.S.2d 157 (1st Dep't 1984). The New York Court of Appeals (Kaye, J.) denied leave to appeal on May 30, 1984. People v. Mayo, 62 N.Y.2d 808, 477 N.Y.S.2d 1033 (1984). After the Court of Appeals reversed the conviction of petitioner's co-defendant, see People v.

Ranghelle ("People v. Buster"), 69 N.Y.2d 61, 511 N.Y.S.2d 580 (1986), for failure to turn over Rosario[1] material, petitioner sought reconsideration of the denial of leave to appeal. Judge Kaye, however, again denied leave to appeal. People v. Mayo, 69 N.Y.2d 883, 515 N.Y.S.2d 1031 (1987). Petitioner then moved in the Appellate Division for relief arguing ineffectiveness of appellate counsel. The Appellate Division denied petitioner's motion on November 17, 1987. The Court of Appeals denied leave to appeal on the ground that the order of the Appellate Division was not appealable.

Petitioner in this court raises the same eight grounds for relief he urged in the Appellate Division: (1) insufficiency

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[1]People v. Rosario, 9 N.Y.2d 286, 213 N.Y.S.2d 448 (1961), cert. denied, 368 U.S. 866 (1981).

of the evidence; (2) failure of the state to turn over exculpatory evidence; (3) illegal search; (4) impermissibly suggestive lineup; (5) improper remarks of the prosecutor in summation; (6) evidence of uncharged crimes wrongly admitted; (7) improper Sandoval ruling and (8) excessive sentence. Petitioner also successfully moved in this court to add a claim of ineffectiveness of appellate counsel.

The New York Court of Appeals outlined the facts underlying petitioner's conviction when it reversed his codefendant's conviction:

> All three charges stemmed from a single incident during which Aquilino Benitez, a student attending Columbia University, was robbed by two men in the elevator of his apartment building. At trial, Benitez was the chief witness for the prosecution. He testified that on the day in question two men entered the elevator with him at the ground floor, stopped it at

> the sixth floor, and then robbed him of jewelry and money after displaying a gun and a knife. Although Benitez described the event in detail, he gave no description of the robbers beyond differentiating between them as "older" and "younger". Benitez made an in-court identification of defendant and [petitioner], and he testified to his prior identification of the two men during separate lineups at the police station.

People v. Buster, 511 N.Y.S.2d at 583.

In addition to the facts cited by the Court of Appeals, the prosecution presented other evidence. Several days after the robbery, on September 28, 1980, Detective James Carter, with the Housing Authority Police, arrested petitioner in the area of 104th Street and Broadway.[2]

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[2]The evidence at petitioner's suppression hearing disclosed that Carter on September 28, 1980, investigating a series of robberies in the Frederick Douglas Housing Project, Transcript of Suppression Hearing ("Hg.") 164, was driving in his car with a victim of one of

(continued...)

At that location, Carter removed his badge from his pocket, identified himself to petitioner as a police officer and order petitioner to stop. Transcript of Trial ("Tr.") 161. Petitioner ran from the sidewalk into the street between two parked cars and removed a silver-colored white-handled revolver from his clothing. Tr. 162. A struggle followed and the detective gained possession of the revolver and handcuffed petitioner. Id. The detective vouchered the weapon at the precinct house and noticed that it was a .22 caliber starter's pistol. Tr. 163.

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[2](...continued)
the robberies in the vicinity of 103rd Street and Broadway. The victim identified petitioner as one of the people who robbed her. Hg. 73.

Benitez identified this weapon as the gun used in the robbery.[3] Tr. 34.

Carter noticed at the precinct that petitioner, talking to his wife, had a silver ring on his right little finger with the letters T-u-t-o on it. Tr. 169. She spoke with him within view of the detective. Tr. 169-70. Prior to the conversation, Carter instructed petitioner's wife not to give anything to or take anything from petitioner because he was under arrest. Tr. 170. Nevertheless, the detective observed that petitioner removed his ring from his finger and handed it to his wife,

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[3]Later in the day, the detective also arrested petitioner's uncle and co-defendant, James Buster. Tr. 166-67. The detective recovered a black pocket knife with a panther engraved on it from Buster. Tr. 167. As he did with the starter's pistol, Benitez identified this weapon as the knife used in the robbery. Tr. 35.

whereupon Carter retrieved the ring and terminated the conversation. Tr. 170. Benitez testified that this ring was taken from him during the robbery. Tr. 38. He noted that "Tuto" is his nickname. Tr.37.

Petitioner presented no evidence at trial. His codefendant, however, called two police officers as his witnesses. The first, Eugene Walwyn, interviewed Benitez on September 20, 1980. Tr. 265. Based on Benitez's description, Officer Walwyn filled out a form that indicated both robbers were five feet eight inches tall. Tr. 269-70. At trial, though, he recalled that Benitez had told him that one was five feet eight and the other five feet six. Tr. 271. He explained that he wrote only one height in his notes. Id. Apparently, petitioner was taller than Buster. Tr. 79. Walwyn testified he also

erred when he said Mayo had a gray moustache. Actually, Buster had a gray moustache. Walwyn further erred in writing down what floor Benitez told him the robbery occurred on. The other witness the co-defendant called, Thomas McCaffrey, also interviewed Benitez. Officer McCaffrey filled out a form, after talking with Benitez, that described the gun the robbers used but did not mention a knife. Tr. 288-89.

Discussion

(1) Sufficiency of the evidence

As noted, petitioner raises a sufficiency of the evidence claim. The state argues that petitioner has either abandoned this claim or failed to exhaust it. After the Appellate Division affirmed petitioner's conviction, he sought leave

to appeal to the Court of Appeals, but did not raise this claim there. Since petitioner has raised it here, it is difficult to say he abandoned this claim. As for exhaustion, this court need not require petitioner to present this claim to a state court because it is clear that the state court would hold the claim procedurally barred. Harris v. Reed, 109 S.Ct 1038, 1043 n.9 (1989). Thus, we address the merits.

We examine the sufficiency claim under the standard of Jackson v. Virginia, 443 U.S. 307 (1979), where "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Id. at 319 (emphasis in original).

Under this standard, the record shows overwhelming evidence to support the jury's finding. Benitez identified petitioner at a lineup and at trial. Even if Benitez had poor eyesight, as petitioner attempted to show, petitioner, at the time of his arrest about a week after the robbery, had Benitez's ring. In addition, Benitez identified the starter's pistol petitioner had on him when arrested as the weapon used in the holdup. Granted, Benitez thought that the gun was real, but no evidence demonstrated that Benitez was a weapons expert. More than that, petitioner admitted committing a number of robberies with his uncle. Finally, petitioner's failure to raise this claim in the Court of Appeals suggests that he lacked confidence in it.

(2) Brady Violation

Petitioner also claims that the prosecutor intentionally failed to disclose vital information to him, namely that Benitez wore glasses and did not wear them on the date of the robbery. Petitioner argues that this information was exculpatory and, under Brady v. Maryland, 373 U.S. 83 (1963), had to be disclosed. Petitioner learned of this information during the cross-examination of Benitez by his co-defendant's counsel on March 16, 1981, a Monday. The prosecutor had received this information the previous Friday, tr. 102, and did not disclose it. She did not consider this information relevant because the victim told her then that he "could see fine during the robbery," tr. 101, and she did not consider it Brady material. Tr. 103.

Both defense counsel then moved to dismiss the indictment and the trial court denied their motion.

The trial court, however, permitted defense counsel to conduct a voir dire examination concerning the condition of Benitez's vision outside the jury's presence. Benitez stated that he is nearsighted in both eyes and that he wore glasses at the line-up. Tr. 105. The trial court then permitted Benitez's glasses to be taken to an optometrist. Defense counsel during a luncheon recess took Benitez's glasses to an optometrist, but the optometrist could not, by looking at the glasses, analyze Benitez's vision. Tr. 120-21. The court then granted counsel's request to have Benitez's eyes examined overnight. Tr. 122. Apparently, defense counsel never had Benitez's eyes

examined. The court again denied the motion to dismiss. Tr. 120. The court said that Benitez could see up close and the robbery occurred up close. Id. Also, the court said that the information did not rise to the level of Brady material and should be left for cross-examination. Id.

Under Brady, the prosecution must disclose evidence favorable to an accused where the evidence is material to guilt or punishment. 373 U.S. at 87. For a Brady violation to occur there must be a reasonable probability that the jury would have resolved the case differently had the prosecution disclosed the information. Payne v. LeFevre, 825 F.2d 702, 707 (2d Cir.), cert. denied, 484 U.S. 988, 108 S.Ct. 508 (1987); see also United States v. Agajanian, 852 F.2d 56, 58 (2d Cir.

1988). Petitioner has not shown a reasonable probability that had the prosecution disclosed this information sooner, the result of the trial would have been different. As the state argues, since the robbery occurred in close quarters, the victim's nearsightedness did not tend to exculpate petitioner or undermine the victim's account. Not only that, this is not a case where the failure to disclose information precluded the defense from raising it at trial. On the contrary, the defense had a full opportunity to cross-examine the witness to probe his ability to identify petitioner. Accordingly, this claim should be rejected.

(3) Illegal Search Claim

Petitioner for his third claim contends that the search of his premises was illegal and anything obtained as a result should have been suppressed. After petitioner's arrest, the police took him to his apartment, without his consent, and seized jewelry, two jackets, pawn tickets and a pistol. Petitioner moved before trial to suppress this evidence as well as his statements and his line-up identification.[4] The trial court found

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[4]At the suppression hearing, each side presented different versions of the facts. For example, petitioner denied he had a pistol on him at the time of his arrest. The police took it from his from [sic] a closet in his apartment, he said. His wife, who also testified at the hearing, supported his statement of the facts. In contrast, Carter testified, as he did at trial, that he recovered the pistol when he arrested petitioner on the street. The trial court credited Carter's testimony and found petitioner's testimony "incredible" Hg. 441-42.

petitioner had consented to the search of his apartment and denied the motion to suppress the evidence.[5]

In regard to the statements petitioner made, after the arrest, Carter placed petitioner in a car to go to the precinct. At Broadway and 96th Street, Carter stopped the car to inform petitioner of his constitutional rights. At that time, petitioner stated that he

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[5]The state submits that no significant evidence was seized from petitioner's apartment. Carter recovered the pistol when he arrested petitioner on the street. He obtained the ring when petitioner attempted to give it to his wife at the station house. Carter at the hearing testified that he did not take any jewelry from the apartment. Hg. 261-62. Carter recovered the knife at the apartment, to be sure, but it was in the possession of James Buster, who was arrested at that time. The police did take a rawhide jacket from the apartment, yet the jacket was not introduced into evidence at the trial. Carter also recovered receipts, which apparently were the pawn tickets petitioner referred to, from petitioner's person at the time of the arrest.

wanted to cooperate because he had been recently released from prison and owed seven years. He then admitted committing a number of robberies with his uncle, who, though released, was with petitioner when Carter arrested him. Petitioner added that he had sold much of the jewelry he had stolen to the Japan Art Center, located at Broadway, between 95th and 96th Streets. At the hearing, petitioner denied making these statements. Hg. 392. He also established that he owed no time on parole. In any event, the trial court granted petitioner's motion to suppress his statements.

Thus, the only issue on this claim concerns the motion to suppress the evidence.[6] That issue is not cognizable

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[6]The motion to suppress the identification is discussed below.

on habeas review. "[W]here the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." Stone v. Powell, 428 U.S. 465, 495 (1976) (footnotes omitted).

The only issue here is whether New York gave petitioner an opportunity to fully and fairly litigate his Fourth Amendment claim. The existence of a procedural mechanism under which a state prisoner could have raised such a claim is sufficient to satisfy the "opportunity" language in Stone, whether or not the prisoner took advantage of that mechanism. Gates v. Henderson, 568 F.2d 830, 837 (2d Cir. 1977), cert. denied, 434 U.S. 1038

(1978). New York concededly provides defendants with such a statutory mechanism for suppression of evidence in New York Criminal Procedure Law § 710. McPhail v. Warden, Attica Correctional Facility, 707 F.2d 67, 69 (2d Cir. 1983). Of course, petitioner employed this procedural mechanism, and appropriately raised, in a pretrial hearing, his claim that the physical evidence should be suppressed because it followed an illegal arrest.

Petitioner has not attacked the adequacy of the suppression hearing,[7] only

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[7]The adequacy of a suppression hearing would be judged by criteria set forth in Townsend v. Sain, 372 U.S. 293, 313 (1963). See Stone v. Powell, supra, 428 U.S. at 494 n.36. Consequently, it appears, at least for those habeas petitioners who previously invoked the state's procedural mechanism to fully and fairly litigate their Fourth Amendment claim, that a federal habeas court could conceivably entertain a Fourth Amendment challenge to a state conviction if the

(continued...)

its result. Even if we disagree with the state court's findings, we would have no authority to grant petitioner habeas relief on this basis, as long as the hearing procedure itself was full and fair. Gates v. Henderson, supra, 568 F.2d at 840. Therefore, petitioner's claim for habeas relief on this ground is rejected.

(4) Identification

Petitioner next claims that his line-up was impermissibly suggestive.[8] He also complains about the trial court's denial of his application to call Benitez as a

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[7](...continued)
petitioner also alleges that his suppression hearing was deficient under one of the six Townsend criteria. See Gates v. Henderson, supra, 568 F.2d at 837.

[8]This claim, like the sufficiency of the evidence claim, was not raised in the Court of Appeals.

witness at the hearing. Petitioner wanted to show that Benitez knew that the police had the suspects in custody.[9] Petitioner testified at the hearing that he heard Detective Carter calling individuals concerning the line-up in which the detective stated that he had two suspects in custody and described the clothing they had on. Hg. 563. He also notes that the authorities showed Benitez the gun, knife and ring before and after the line-up. Petitioner further claims that Benitez may have twice viewed the same line-up, but selected petitioner from only one. Finally, he complains that before the line-up, Benitez viewed a photo array that did not include him.

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[9]Benitez testified at trial that he expected to see the people that robbed him in the line-up. Tr. 151.

The trial court denied petitioner's motion to suppress the in-court identification, should it occur, and the line-up testimony. Hg. 599-600. Again, the court found Carter's testimony credible. Hg. 598. The trial court denied the application of both defense counsel to call Benitez, but she permitted them to interview him after the hearing but before trial. Hg. 586. The court also permitted both defense counsel, after the interview, to renew their request to reopen the hearing because of something learned from Benitez. Hg. 586. The interview took place, yet neither petitioner nor his co-defendant sought to reopen the hearing.

Although the trial court's findings of fact are entitled to deference, in this case petitioner, in effect, argues that he

did not get a fair hearing because of the court's refusal to call Benitez. Nonetheless, we find no error in the court's resolution of the motion to suppress the identification. Its factual findings are supported by the record. The court's rejection of petitioner's testimony that he heard Carter describe petitioner's clothing to people on the telephone appears well founded. As the court said, it strains credulity that Carter would describe the clothing to Benitez in front of petitioner.

On the other hand, Carter testified that he told Benitez that he wanted him to view some suspects. Hg. 93. Benitez at trial testified that Carter told him he had a couple of guys he wanted him to look at. Tr. 139. Benitez's knowledge that he was to view suspects does not make his

identification impermissibly suggestive. See Brayboy v. Scully, 695 F.2d 62, 65 (2d Cir. 1982), cert. denied, 460 U.S. 1055 (1983). Were such knowledge alone sufficient to preclude use of the identification at trial, any procedure would be vulnerable since witnesses to a crime always know they are viewing photo arrays and line-ups in order to make a possible identification. Id. Even had Benitez testified at the hearing, his testimony at trial indicates that he would have only confirmed Carter's version of the facts. Furthermore, the failure of defense counsel to seek to reopen the hearing, after interviewing Benitez, further supports Benitez's trial testimony.

That Benitez saw the gun, knife and ring before the line-up, a fact disputed

by Carter, did not render the line-up suggestive. As the state argues, whom to choose and from which of the two line-ups would not have been suggested to him. Lastly, in regard to the claim concerning two line-ups, apparently Benitez viewed a prior line-up without petitioner and did not choose anyone. In any event, as the state argues, nothing in the record suggests that petitioner participated in a line-up in which Benitez failed to identify him.

(5) Prosecutorial Misconduct

Petitioner also challenges several comments made by the prosecutor in her summation.[10] He does not, however,

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[10]The state argues that six of the eight challenges to the prosecutor's summation are procedurally barred because defense counsel failed to object to those

(continued...)

indicate why these comments deprived him of any constitutional rights. He merely lists the comments. Even in the Appellate Division, petitioner cited general propositions concerning the summation of the prosecution without specifying why the challenged comments constituted error. A petitioner has a difficult burden in the ordinary case to show prosecutorial misconduct. For a prosecutor's conduct to result in deprivation of a defendant's

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[10](...continued)
portions of the summation. Wainwright v. Sykes, 433 U.S. 72 (1977). The state recognizes that Harris v. Reed, 109 S.Ct. 1038, 1043 (1989), requires that the Appellate Division plainly state that it s affirmance of the conviction rests on a procedural bar before we can find a procedural default. As noted, the Appellate Division affirmed without opinion. Nevertheless, the state argues that Harris should not be given retroactive effect. That argument, however, was rejected after the state filed its brief. Peterson v. Scully, 896 F.2d 661, 664 (2d Cir. 1990). We therefore address the merits.

constitutional rights, it must be shown to have been egregious to a degree that infects the fairness of the entire trial. Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974). "It is well-settled that both the 'prosecution and defense are entitled to broad latitude in the inferences they may suggest to the jury during closing arguments', provided they do not misstate the evidence, refer to facts not in evidence, or express counsel's personal belief as to guilt or innocence." United States v. Smith, 778 F.2d 925, 929 (2d Cir. 1985) (quoting United States v. Suarez, 588 F.2d 352, 354 (2d Cir. 1978). Applying these principles, we find this petitioner's claim without merit.

First, petitioner challenges a remark about reasonable doubt: "If you cannot give a sound reason, an intellectually

honest reason, a reason that a reasonable person would recognize as making sense, then your doubt is not reasonable." Tr. 371-72. We see no prosecutorial misconduct. To begin with, the prosecutor responded to an argument made by defense counsel. Defense counsel had discussed reasonable doubt, moral certainty and mathematical certainty. Tr. 364-65. Furthermore, the prosecutor made this comment, not the court. Petitioner apparently made no objection when the court used similar language in its charge. Tr. 404. Although this language is no longer used, see 1 L.Sand, et. al., Modern Federal Jury Instructions ¶ 4.01 at 4-6 (1990), similar language by a court in its charge has been held constitutionally permissible. Barber v. Scully, 557 F.Supp. 1292, 1296 (S.D.N.Y. 1983), aff'd

on other grounds, 731 F.2d 1073 (2d Cir. 1984). If no error occurred when a court uses this language, it is not error for the prosecutor to use it. The prosecutor should not have gotten into this area, since it is a matter for the court, but we find no constitutional defect in her remarks, a conclusion supported by the lack of any objection from defense counsel. Orr v. Schaeffer, 460 F.Supp. 964, 967 (S.D.N.Y. 1978).

Next, petitioner complains about this comment: "I suggest to you that you should not waste your time, too much of your time, on those police reports made out by police officers in hectic police typings by two finger typing geniuses who are thinking about other things." Tr. 373. Nothing is improper about this remark. A police officer, called by

petitioner's co-defendant, testified that a report he prepared was inaccurate. Tr. 268. Not only that, the defense summation criticized that testimony. Tr. 333. Thus, the prosecutor commented on the evidence and responded to an argument of defense counsel. This finding applies with equal force to the next part of the summation that petitioner challenges: "If you use your common sense, victims of crime are not usually shown the report." Tr. 373-74. Moreover, defense counsel raised no objection to these comments at trial.

The next claim of error, equally without merit, concerns a remark the prosecutor made in which she referred to defense counsel's suggestion of a "police frame." Tr. 374. That implication, the prosecutor said, is "merely a smoke screen

to take you away from the central issue in this case." Id. This comment merely responded to the implication of a police frame. See tr. 354. Again, defense counsel raised no objection to this remark.

For another claim of error, petitioner challenges this remark: "I suggest to you, ladies and gentlemen, that one of the reasons the defendant may have had that gun in his hand was to throw it away." Tr. 375. Again, we see nothing improper about this remark. This comment responded to the defense argument that a reasonable person, confronted by a police officer, would not have pulled out a fake gun. Tr. 353. Counsel objected to this remark, and the court responded that the jury's recollection will govern. Tr. 376.

Immediately after the court made its response, the prosecutor said: "Just as he tried to throw the ring away." Tr. 376. Petitioner claims error as a result of this remark. The prosecutor, however, made this comment as a result of the testimony of Detective Carter concerning petitioner's attempt to give the ring to his wife. To accept petitioner's view would mean that a prosecutor in summation could never draw a negative inference from evidence at trial.

Next, petitioner challenges this statement: "[Benitez] testified candidly and did not try to hide anything from you." Tr. 377. Although the prosecutor here vouched for Benitez's credibility, see Floyd v. Meachum, 907 F.2d 347, 355 (2d Cir. 1990), she responded to a defense argument. The defense questioned the

ability of Benitez to identify petitioner. Buster's counsel noted that Benitez was not wearing glasses on the night of the incident and that the incident lasted a short time. Tr. 315-16. He noted also that it was 2 a.m., that Benitez was tired, tr. 316-17, frightened, tr. 318, not a careful witness, tr. 321, and predisposed to pick someone from the second line-up 328. Mayo's counsel argued that Benitez had come from Madison Square Garden, yet the smoke there did not bother him. Tr. 345-46. Even if the prosecutor's comments exceeded proper bounds, they did not deprive petitioner of a fair trial. The error was harmless given the clear evidence of guilt. See Garafolo v. Coomb, 804 F.2d 201, 206 (2d Cir. 1986).

Petitioner's last challenge focuses on this statement: "that it was a revolver. And that means that the barrel spins here." Tr. 389. Defense counsel had gone into a description of the gun. Tr. 360-362. He said that Benitez had given various descriptions of the gun. Tr. 360. We find no error here.

Recently, the Second Circuit conditionally granted a writ of habeas corpus because of prosecutorial misconduct. Floyd v. Meachum, supra, 907 F.2d at 357. But in that "rare" case, the court found that the cumulative effects of the prosecutor's remarks deprived Floyd of a fundamentally fair trial. Id. at 348. There, the prosecutor's remarks implicated Floyd's Fifth Amendment right to remain silent. Id. at 354. In addition, the prosecutor asked the jury to pass on her

personal integrity and professional ethics before deliberating on the evidence, thereby implying that she personally vouched for the complainant's credibility. Id. Lastly, the prosecutor characterized Floyd as a liar "literally dozens of times throughout her opening and closing statements." Id. The Second Circuit regarded these repeated references as "clearly excessive and inflammatory." Id. at 355. Not only that, the prosecutor erroneously equated Floyd's alleged lies with proof of guilt beyond a reasonable doubt. Id. Nothing in the present case approaches the excesses that the Court of Appeals detailed in Floyd.

(6) Evidence of Uncharged Crimes

Petitioner contends that the trial court erred by allowing the jury to be

influenced by evidence of uncharged crimes. In response to a question from the prosecutor, Detective Carter testified that he picked up Benitez at a housing police office of the Frederick Douglas House and transported him to the precinct for the lineup. Tr. 181-82. The prosecutor also asked him if Benitez was alone at the time he picked him up. Tr. 182. The detective answered that Benitez was with other civilians at the time. Id. Petitioner's counsel moved for a mistrial as a result of this testimony. Tr. 188. He contended that the prosecutor brought out that Benitez was present identifying property from other civilians. Id. This claim lacks merit. As the trial court said in denying this motion, "By no stretch of the imagination can anyone assume from the fact that there were other

civilians present that there were other robberies." Tr. 188-89. In any event, "[e]rroneous evidentiary rulings do not automatically rise to the level of constitutional error sufficient to warrant issuance of a writ of habeas corpus." Taylor v. Curry, 708 F.2d 886, 891 (2d Cir.), cert. denied, 464 U.S. 1000 (1983). To justify issuance of the writ, petitioner must show that the error deprived him of a fundamentally fair trial. Id. Petitioner has failed to make that kind of showing.

The same rationale applies to the next claim. Apparently, petitioner argues that the introduction of three receipts from the Japan Art Center showed that he had committed other crimes. Tr. 240-42. The receipts, however, only showed that petitioner and his co-defendant had sold

three items. These receipts did not show that the items were stolen or suggest that they were stolen in other robberies. As the state points out, Benitez had testified that in addition to his silver "Tuto" ring, five items of jewelry were taken from him. The most logical inference for the jury to draw would be that the receipts concerned the instant robbery. Accordingly, this claim should be rejected.

(7) The Sandoval Hearing

Petitioner claims that the trial court erred in denying his Sandoval application.[11] The trial court stated it

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[11]People v. Sandoval, 34 N.Y.2d 371, 357 N.Y.S.2d 849, 853 (1974), allows the trial court to "make an advance ruling as to the use by the prosecutor of prior convictions or proof of prior commission of specific criminal, vicious or immoral

(continued...)

would allow the prosecutor to go into the underlying facts of a ten-year-old petty larceny conviction and a 1975 conviction for possession of stolen property. With respect to a 1975 attempted robbery conviction, the court would permit the prosecutor to inquire as to whether petitioner was convicted of a felony at that time. Tr. 12. The court also indicated that it would permit inquiry, concerning other misdemeanors, as to whether petitioner had been convicted of a misdemeanor at the particular time.

Nevertheless, "[t]he admission of prior convictions for the purpose of impeaching a defendant is an evidentiary question, and is therefore, not subject in [sic] federal habeas corpus relief absent

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[11](...continued)
acts for the purpose of impeaching a defendant's credibility."

a showing that the alleged constitutional errors were of 'constitutional magnitude.'" Ford v. Hood, 1989 WL 99812 at 3, (S.D.N.Y. August 24, 1989) (Griesa, J.) [DCT database] (quoting Jenkins v. Bara, 663 F.Supp. 891, 899 (E.D.N.Y. 1987)); see also Ayala v. Hernandez, 712 F.Supp. 1069, 1076-77 (E.D.N.Y. 1989). Petitioner has not explained how the Sandoval rulings impacted on his decision not to testify or how that made his trial fundamentally unfair. Moreover, where a habeas petitioner fails to take the stand at trial, a Sandoval ruling permitting impeachment by a prior conviction will not present an error of constitutional magnitude. Carroll v. Hoke, 695 F.Supp. 1435, 1439-1440 (E.D.N.Y. 1988), aff'd mem, 880 F.2d 1318 (2d Cir. 1989) (citing Luce v. United States, 469 U.S. 38, 43

(1984)).[12] Finally, in light of the clear evidence of guilt, even had error occurred, it would be harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 23 (1967); United States v. Durrani, 835 F.2d 10, 26 (2d Cir. 1987); see also United States v. Scanio, 900 F.2d 485, 493 (2d Cir. 1990). Thus, the claim should be rejected.[13]

(8) The Sentence

Petitioner's claim that his sentence was both cruel and unnecessary need not

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[12]In Carroll, the court noted that Luce concerned a direct appeal of a federal evidentiary ruling rather than a habeas petition, but stated that it could "find no meaningful distinction between the situation in Luce and the present case." 695 F.Supp. at 1440.

[13]This claim, too, was not raised in the Court of Appeals.

detain us long.[14] The sentence did not exceed the maximum sentence prescribed under the relevant criminal statute and, thus, does not raise any constitutional issues. Castro v. Sullivan, 662 F.Supp. 745, 753 (S.D.N.Y. 1987).

Ineffectiveness of Appellate Counsel

Petitioner's ineffective assistance claim raises a more difficult question. As noted, the New York Court of Appeals reversed the conviction of petitioner's co-defendant, James Buster, because of the prosecutor's failure to turn over Rosario material. See People v. Buster, 511 N.Y.S.2d 580. Buster held that Rosario violations require per se reversal. Id.

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[14]Again, petitioner failed to raise this claim in the Court of Appeals.

at 585. Noting that trial counsel preserved the Rosario claim, see tr. 301-04, petitioner argues that his counsel's failure to raise that claim on appeal failed to satisfy constitutional standards. He adds that the result of his criminal proceeding would have been different but for counsel's error. Strickland v. Washington, 466 U.S. 668, 687 (1984). Petitioner notes that after his appellate counsel learned of the reversal, counsel sought reconsideration in the Court of Appeals on the ground that petitioner should receive the same benefit as his co-defendant. Because of appellate counsel's failure to raise the Rosario claim in a timely manner, petitioner continues, the Court of Appeals denied the application.

For the events at trial leading to the reversal of Buster's conviction, we turn again to the Court of Appeals:

> The defense theory was misidentification. Aware that incident reports completed by a police officer and a Housing Authority detective contained descriptions of the robbers obtained from Benitez that varied from the physical attributes of defendant and his codefendant, and assuming that these incident reports constituted all the Rosario material to which the defendant was entitled, defense counsel contented himself with eliciting a detailed description of the two robbers from Benitez. he later called the police officer and the Housing Authority detective, as witnesses for defendant, and questioned them regarding the descriptions of the robbers contained in their incident reports in an attempt to impeach Benitez's testimonial descriptions by showing the inconsistent descriptions contained in the incident reports.
>
> On cross-examination and over defense counsel's repeated objections and request for a sidebar, the prosecutor was

permitted to elicit testimony that both officers had kept memo books containing notes of their investigation of the Benitez complaint. In response to the prosecutor's questions as he read from the memo books, both witnesses acknowledged that they made the notes while interviewing Benitez shortly after the robbery and by their testimony they confirmed that Benitez's description of the robbers at trial and his description of them made during their investigation was consistent. The discrepancies in the incident reports, they testified, were due to errors in their own transcription of Benitez's statements from the memo books to the incident reports. Apparently, the books were never physically delivered to defendant's counsel before all parties had rested and the evidence was closed. Defense counsel then moved for a mistrial and the Trial Judge belatedly recognized that the memo books constituted Rosario material that had not been provided to defendant. Nonetheless, she denied defendant's motion and instead instructed the memo book entries. Defendant was subsequently convicted of all three charges and the judgment

> was affirmed by the Appellate Division.

511 N.Y.S.2d at 583-84.[15]

To succeed on a claim of ineffective assistance of counsel, petitioner must show that his counsel's performance fell below "an objective standard of reasonableness" under "prevailing professional norms" and that "but for counsel's unprofessional conduct the result of the proceeding would have been different." Strickland, 466 U.S. at 688. The Strickland court also noted that "[j]udicial scrutiny of counsel's performance must be highly deferential." Id. at

It seem clear that had appellate counsel raised the Rosario claim, the

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[15]Although the reference to defendant in the quoted language refers to Buster, petitioner's trial counsel joined in the motion for a mistrial.

result of the proceeding would have been different. Our inquiry, then, focuses on whether counsel's performance fell below an objective standard of reasonableness under prevailing professional norms.

In People v. Barshai, 100 A.D.2d 253, 474 N.Y.S.2d 288 (1st Dept), lv to appeal denied, 62 N.Y.2d 804, 477 N.Y.S.2d 1028, cert. denied. 469 U.S. 885 (1984), Barshai's co-defendant successfully moved to suppress certain evidence and, as a result, his indictment was dismissed. Id. at 289. Barshai's counsel, however, did not move to suppress and a jury subsequently convicted Barshai of first degree robbery and other charges. Barshai then filed a post-conviction motion to vacate his conviction on the ground that counsel's failure to move amounted to ineffectiveness. The Appellate Division

affirmed the trial court's denial of the motion principally on the Barshai's lack of standing, since he had told counsel that he did not possess the items in question. The court also found, however, that counsel could reasonably have believed that a motion to suppress had little chance of success. Id. at 293. Nevertheless, when Barshai filed a habeas petition in this court, Judge Lasker directed a hearing to determine the reasons for trial counsel's failure to make a suppression motion. Allah v. LeFevre, 623 F.Supp. 987, 993 (S.D.N.Y. 1985).[16] The evidence adduced at the hearing, Judge Lasker said, may well

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[16]The subsequent history of this case is reported at 1986 WL 14305 (S.D.N.Y. Dec. 5, 1986), aff'd mem., 819 F.2d 1129 (2d Cir.), cert. denied, 484 U.S. 866 (1987).

decide whether counsel's assistance was effective. Id.

The state cites United States ex rel. Roche v. Scully, 739 F.2d 739 (2d Cir. 1984), where the petitioner asserted ineffectiveness of appellate counsel based on counsel's failure to raise a jurisdictional claim -- namely, that Roche was prosecuted in the wrong county -- that would have succeeded because of the holding of a subsequent Appellate Division case, People v. Cullen, 65 A.D.2d 594, 409 N.Y.S.2d 263 (2d Dept 1978), rev'd on other grounds, 50 N.Y.2d 168, 428 N.Y.S.2d 456 (1980). In Roche, though, the ineffectiveness claim was based on a failure to forecast a change in the law.[17]

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[17] "[T]he failure to anticipate a change in the law will not generally constitute ineffective assistance of counsel." Brunson v. Higgins, 708 F.2d

(continued...)

In finding that counsel was not ineffective, the Second Circuit noted that counsel could not have reasonably foreseen Cullen from the result in another earlier case. 739 F.2d at 744.

In our case, by contrast, Rosario was the law. In addition, the legislature in 1979 statutorily implemented Rosario. See New York Criminal Procedure Law § 240.45. It would appear that attorneys, as a matter of course, would raise a Rosario argument. It is true that whether the failure to produce Rosario material amounted to a per se violation did not become clear until Buster. 1988 Practice Commentaries to N.Y. Criminal Procedure Law § 240.45, 11A Criminal Procedure Law

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[17](...continued)
1353, 1356 (8th Cir. 1983); see also Horne v. Trickery, 895 F.2d 497, 500 (8th Cir. 1990).

(McKinney's 1990 supp.) at 171. The record, however, is inadequate to determine the reason for counsel's failure to raise that argument.

The state points to the Appellate Division's unanimous affirmance of Buster's conviction to support the reasonableness of counsel's action. If the Appellate Division believed the Rosario claim lacked merit, the argument is, then counsel could have reasonably reached the same conclusion. The state's argument is not without force. Nonetheless, the record does not indicate the practice of the defense bar concerning Rosario claims.

Accordingly, a hearing should be held before the undersigned concerning the reasons failed to raise the Rosario claim and the practice of the New York defense

bar regarding such claims. Roche, 739 F.2d at 745 (Winter, J., dissenting).

CONCLUSION

For the reasons stated, we recommend that the petition for a writ of habeas corpus be dismissed except with respect to the claim of ineffective assistance of appellate counsel. In regard to that claim, we recommend that a hearing be held before the undersigned and that counsel be appointed to represent petitioner at the hearing.

Copies of this report have been mailed this date to the parties listed below, who are hereby advised of their right to file objections to this report with Judge Mckenna on or before November 2, 1990. See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72, 6(a), 6(e). Failure to object to this report by that date will preclude appellate review. Small v.

Secretary, 892 F.2d. 15, 16 (2d Cir. 1989).

Dated: New York, New York
October 16, 1990

Respectively submitted

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